IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY MICHAELS, 43 Diamond Run Street Las Vegas, NV 89148, *Plaintiff*,	*	
v.	*	
MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530;	*	
ROD J. ROSENSTEIN, IN HIS OFFICIAL CAPACITY, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530;	*	
NOEL J. FRANCISCO, IN HIS OFFICIAL CAPACITY, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530; *Defendants*.	*	Case No. 18-cv-2906
AND	*	
UNITED STATES OF AMERICA *ex rel.* BARRY MICHAELS, 43 Diamond Run Street Las Vegas, NV 89148, *Plaintiff*,	*	
v.	*	
MATTHEW G. WHITAKER, IN HIS INDIVIDUAL CAPACITY, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, *Defendant*.	*	
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PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EMERGENCY MOTION

INTRODUCTION

Plaintiff submits this supplemental memorandum in an effort to anticipate the Government's procedural arguments in opposition to the motion for preliminary injunction. We attach two Appendices as well. Appendix A is a detailed draft article—just called to our attention—on the proper construction of the Vacancies Reform Act (Vacancies Act), 5 U.S.C. §§ 3345 *et seq.*, and Attorney General Succession Act (AG Act), 28 U.S.C. § 508. Appendix B is a "decision tree" that identifies the subsidiary legal questions raised by both Plaintiff and the Government with respect to Plaintiff's three separate arguments on the merits:

(1) Mr. Whitaker is serving as a "principal officer" rather than a subordinate, because his job is not defined as one with a supervisor with the further responsibility to fill in for the principal on a temporary basis.

(2) Even if Mr. Whitaker is a subordinate, he must be confirmed because his appointment was not a response to temporary and special conditions in order to maintain the unbroken performance of the Attorney General's functions.

(3) Mr. Whitaker was not validly appointed under the Vacancies Act, but rather Mr. Rosenstein became Acting Attorney General as a matter of law under the AG Act.

We provide the decision tree regarding the merits as a courtesy, given the expedited nature of the proceedings, in the event the Court would find it useful.

Here, we focus on procedure. In Plaintiff's view, the Court should proceed as follows:

First, the Court should determine its authority (1) to decide the case, and (2) to issue a preliminary injunction. We believe it should evaluate that question with respect to its authority to issue equitable relief under *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015), and *SW Gen., Inc. v. NLRB*, 796 F.2d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017).

Although our Motion also invoked the writ of quo warranto as a separate source of authority, we recognize that a private party's reliance on that source of authority raises a host of collateral issues that need not be resolved on an expedited basis. In an effort to simplify the expedited proceedings, we withdraw that request at the preliminary injunction stage and leave it for proceedings on the merits.

Second, the Court should decide whether Plaintiff is likely to prevail on the merits. In our view, the Court should follow principles of constitutional avoidance. It seems plain that there is—at the very least—substantial doubt that Mr. Whitaker's appointment was consistent with the Appointments Clause. The question then is whether it is "fairly possible" to read the Vacancies Act and the AG Act such that Mr. Rosenstein is the Acting Attorney General. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). We think they obviously can; indeed, in the other briefs it has submitted on this question, the Government has never argued that they cannot.

Third, the Court should grant Plaintiff preliminary injunctive relief. It should issue an Order that Mr. Whitaker may not participate in or influence the litigation of Plaintiff's suit against the United States. We believe that Order would have several collateral consequences, but do not believe the Order itself need provide for them. Mr. Rosenstein—in his role as Acting Attorney General—would hear from Plaintiff's counsel and determine whether to defend the constitutionality of the statute challenged by Plaintiff, certifying that decision to Congress as appropriate. Further, the United States—in the person of Mr. Rosenstein and Mr. Francisco—would prepare the United States' opposition to Plaintiff's petition for a writ of certiorari free from either direct input by Mr. Whitaker or the overhang of his service as Acting Attorney General. In the event it would be necessary for the Government to take an extension of time to comply with

the Court's Order, Plaintiff will agree to such an extension because it is the necessary consequence of Plaintiff's own request for relief.

Fourth, the Court—having issued that injunction—should stay its hand. Plaintiff will promptly request that Mr. Rosenstein—as Acting Attorney General—initiate an action on behalf of the United States under a writ of quo warranto to remove Mr. Whitaker. By law, Mr. Rosenstein will receive and consider that request personally. D.C. Code § 16-3502. Plaintiff has already lodged that request with the Office of the Attorney General, requesting that Mr. Rosenstein act upon it in the wake of an Order of this Court. *See* Exhibit to Am. Compl., DE14-1.

Before turning to the procedural arguments we anticipate the Government will make in opposition to the Motion, we should anticipate one point about the Appointments Clause. When the Government has litigated this question in other courts, it has consistently attacked a straw man. It has argued that there are times that a non-confirmed person can perform the functions of a principal officer. Plaintiff does not dispute that, in the slightest; it is not the issue. The actual question is whether this is one of those circumstances. Whenever the Court sees the Government make the point that statutes and history show that a non-confirmed official temporarily performed the duties of a principal officer, it should recognize that the Government is avoiding the actual issue.

ARGUMENT

I. The Preliminary Injunction Would Not Interfere With The Supreme Court's Authority To Manage Its Proceedings.

The Government asserted (in opposing Plaintiff's proposed briefing schedule) that a preliminary injunction would interfere with the Supreme Court's exclusive authority to manage its own proceedings. In support, it cited *In re Marin*, 956 F.2d 339 (D.C. Cir. 1992), a three-paragraph per curiam order, which denied a petition for a writ of mandamus to order the Clerk of the Supreme

Court to file various documents. In that case, the Court's own rules governed the filing of documents. The Court reasoned: "We are aware of no authority for the proposition that a lower court may compel the Clerk of the Supreme Court to take any action." *Id.* The Government sought to suggest the opinion's holding was broader only by leaving out the following italicized language: "The Supreme Court, on the other hand, has inherent supervisory authority *over its Clerk*." *Id.* (emphasis added).

In asserting that an injunction will interfere with the Supreme Court's control over its own proceedings, the Government's argument misconceives the relief Plaintiff seeks. It is true that Plaintiff is currently litigating against the United States in the Supreme Court and that the immediacy of his injury justifying a preliminary injunction relates to that litigation. But plaintiff does not request an injunction directed to any officer or employee of the Supreme Court. Nor would the injunction indirectly require or cause any such officer or employee to do anything.

Plaintiff instead seeks an injunction against Mr. Whitaker unlawfully taking actions in his official capacity outside the Supreme Court, within the Department of Justice. That injunction will have consequences outside the Supreme Court. As noted, Mr. Rosenstein would supervise the litigation instead and would determine whether to defend the constitutionality of the statute in question.

There is one respect that the lawfulness of Mr. Whitaker's appointment does directly implicate the proceedings in the Supreme Court. But that is his status as a *party*, not an *attorney* with authority over the case. Mr. Whitaker was substituted in the Supreme Court a as defendant. With respect to that question—which is addressed by the Supreme Court's Rules—Plaintiff did

request that the Supreme Court grant him relief.[1] Here, by contrast, Plaintiff challenges Mr. Whitaker's power to supervise the litigation. The injunction sought by Plaintiff would not affect Mr. Whitaker's designation as a party in the Supreme Court.

Of note, in opposing Plaintiff's motion to substitute, the Government argued emphatically that the Supreme Court was powerless to grant relief on a request made directly to it, and that Plaintiff should litigate the lawfulness of Mr. Whitaker's appointment in the lower courts first. He has done just that.

Importantly, to argue that only the Supreme Court has the power to issue the injunction plaintiff seeks, the Government would have to explain (1) what that power is, and (2) how Plaintiff could invoke it. The legal question is whether the Supreme Court's procedures displace this Court's jurisdiction. *See, e.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1993). The Government strikingly failed to address those questions in opposing Plaintiff's motion to expedite. Plaintiff's counsel has been unable to identify any such authority or procedural mechanism.

II. Plaintiff Has Standing To Invoke The Appointments Clause.

When subject to the authority of an unconstitutional officer, a plaintiff need not show a "direct harm." *Landry v. FDIC*, 204 F.3d 1125, 1130 (D.C. Cir. 2000). Why? Because an Appointments Clause violation is "structural," such that a claim may proceed even when "any possible injury is radically attenuated." *Id.* at 1131; *see SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79-80 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). The Appointments Clause is a "'prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions [are not] judicially defensible in the heat of interbranch conflict.'" *Landry*, 204 F.3d at 1131 (quoting

[1] Before the Supreme Court, Petitioner explained that he was equally situated to any other litigant with respect to substitution, but that Mr. Whitaker's participation in the case would affect him personally. He further explained, however, that those facts were not relevant to his substitution request. *See* Motion to Substitute 1; Reply Brief 4 n.1.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995)). Requiring "a clear causal link to a party's harm" for "Appointments Clause violations" would "make the Clause no wall at all." *Id.* Thus, the Appointments Clause is the context where courts are most lenient regarding the relationship between such claim and a plaintiff's injury.

Indeed, a plaintiff need not show that an unlawful official made any particular decision at all. In *Landry*, the D.C. Circuit found that even the *recommendation* of an unconstitutional official—not a decision—was enough to "taint the ultimate judgment" of the ultimate constitutional decisionmaker, even though that recommendation was subject to de novo review by a proper officer higher up the chain. *Landry*, 204 F.3d at 1132. There was a superior (and lawful) authority that decided the issue on *de novo* review, so the unconstitutional actor functionally didn't have authority over the plaintiff at all. Yet the court still found that the plaintiff had standing to bring the claim. *Id.* (Here, of course, the order of authority is reversed—Mr. Whitaker *is* the ultimate decisionmaker, so this is a stronger case.)

To be sure, this isn't to say that *any* allegation will suffice. A plaintiff who asks an Inspector General to conduct an investigation of unrelated third parties, which the IG declines to do, for example, involves "no judicially cognizable interest" in later challenging the IG under the Appointments Clause. *Jefferson v. Harris*, 285 F. Supp. 3d 173, 187 (D.D.C. 2018) (internal quotation marks omitted). But that's because there is "no such thing as a due process right to an investigation" of others "by the . . . Inspector General." *Id.* (internal quotation marks omitted). By contrast, when the plaintiff himself is the subject of direct involvement and oversight of the challenged official, as here regarding plaintiff's Supreme Court case, or there is a statutory right to a decision by the challenged official, as here with *quo warranto*, no more is required to establish standing. This court "should avoid" a view of standing so narrow that it "would likely make it

impossible for [] plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable." *See, e.g.*, *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984).

Plaintiff easily satisfies the applicable standard. This case is worlds apart from one in which a plaintiff challenges the Attorney General's litigation of a case against someone else.

Preliminarily, the Government is likely to make numerous arguments about how other Department of Justice lawyers have line authority over Plaintiff's suit. Those arguments all miss the mark for two reasons. *First*, the Government cannot—and does not—deny that Mr. Whitaker has authority *as well*. Indeed, his authority is superior to anyone else's. This case is not like others in which litigants have, for example, requested that courts dismiss indictments on the basis of Mr. Whitaker's appointment. Plaintiff is not trying to stop the Government from litigating his lawsuit. He merely wants it overseen by a lawful official.

Second, those attorneys are acting on the basis of authority delegated by Mr. Whitaker. *See, e.g.*, 28 C.F.R. § 0.20. It is his power that they are exercising. He could moreover both intercede in the case and also revoke the authority of those other attorneys. It must be possible to bring a suit alleging that an official was unconstitutionally appointed and that the plaintiff was injured by the official's failure to act on his claim. That is this case.

It is also all that the Appointments Clause requires. Otherwise, a principal officer could simply delegate every personal decision to a subordinate and permanently disable the federal courts from enforcing the Constitution. Indeed, the Attorney General does delegate at least 99% of his authority. According to the Government, none of the ensuing applications of his power are subject to challenge. Given the fundamental role of the Appointments Clause to the separation of powers, that cannot be right.

In any event, for three separate reasons, Mr. Whitaker's appointment personally relates to Plaintiff.

First, the Attorney General must personally decide whether to issue the writ of quo warranto. Indeed, by law, Plaintiff is *required* to ask him. D.C. Code § 16-3501. (Even if the Attorney General *could* delegate this particular request, there is no chance he actually *would* do so in practice.) Plaintiff has made that request to Mr. Whitaker, despite its futility: Mr. Whitaker is not going to challenge his own appointment. But it is not a foregone conclusion that Mr. Rosenstein would do so while serving as Acting Attorney General for these purposes, after consulting with Plaintiff's lawyers. The Department of Justice's position thus far is that Mr. Whitaker's appointment is constitutional, but Mr. Rosenstein would have the authority—as Acting Attorney General—to reverse it.

Second, there is a reasonable prospect that Mr. Whitaker has played a role in the litigation. Plaintiff's lawsuit argues that the Second Amendment renders 18 U.S.C. § 922(g)(1) unconstitutional as applied to certain non-violent felons. As described in the Complaint, Attorneys General play a significant role in Second Amendment litigation. Mr. Whitaker has spoken to those issues himself. Am. Compl. ¶23. Further, Plaintiff has litigated the constitutionality of Mr. Whitaker's own appointment. It seems very unlikely that he has played no role in shaping—or at least influencing—how the Government litigated that question.[2]

There is moreover the related point, discussed above, that if Mr. Whitaker has not interceded in this case—including to preserve his own appointment—that was by his own choice.

[2] We expect the Government will speak to the question of Mr. Whitaker's role in its own brief, so we will not belabor the issue here. But if the Government does not deny that he has participated in the case—and instead tries to put on Plaintiff the impossible burden breaking through the attorney-client privilege and *disproving* his role—that the inference he has participated is surely fair.

But even then, the Attorney General exercises enormous influence. It is impossible to say that his subordinates—such as the Solicitor General—have proceeded utterly unconcerned with how Mr. Whitaker would perceive their job performance. For example, could any lawyer for the Government offer anything less than the most full-throated defense of the constitutionality of Mr. Whitaker's appointment, when he has the power to end their careers in the blink of an eye? We think not.

Three, the Attorney General personally determines whether to defend the constitutionality of a federal statute. If the Attorney General determines not to do so, he must personally certify that fact to Congress. 28 U.S.C. § 530D. Mr. Whitaker has made such a judgment. Plaintiff would also seek Mr. Rosenstein's acquiescence in his suit, including in the current proceedings before the Supreme Court, and his related agreement that a non-violent felon may bring that claim in court.

If those do not suffice, nothing ever will. Two of the three powers discussed above—the power to determine whether to defend the constitutionality of a statute and the requirement to assess whether to institute a writ of quo warranto—are among the *very* few personal, non-delegated responsibilities of the Attorney General that produce concrete actions. *Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997) ("The purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint."). Even the most grave responsibilities—such as signing warrant requests to the Foreign Intelligence Surveillance Court—may be performed by other lawyers in the Department of Justice. *See* 50 U.S.C. §§ 1801(g), 1804.

CONCLUSION

For the foregoing reasons and those set forth in the Motion for a Preliminary Injunction, the Motion should be granted.

Dated: December 13, 2018

Respectfully submitted,

By: /s/ Thomas C. Goldstein

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APPENDIX A

FVRA CANNOT BE USED TO APPOINT AN ACTING ATTORNEY GENERAL

By: Stephen Migala

Preview

This article focuses solely on statutes, and avoids constitutional questions, to examine the recent appointment of the Acting Attorney General. It presents a detailed and contextual history behind the Federal Vacancies Reform Act of 1998 (FVRA) and the intent of Congress. And after significant analyses, this article concludes that FVRA cannot be used in such a way. Because of the multitude of information and analyses presented, a short preview is outlined here to entice the reader to undertake a deep dive and understand why that is so. Some points presented include:

- Excerpts of key legislative histories recently made public by the National Archives after the required 20-year embargo. This author was the first to request and examine those records.

- Detailed information behind the specific amendment to the bill version of FVRA that "grandfathered" and retained automatic succession statutes such as 28 U.S.C. § 508 and the office of Attorney General. This includes recently available committee meeting transcriptions as well as written information circulated to senators describing the intent of the provision.

- Codification errors that have affected the proper interpretation of § 508.

- A history of § 508 and its proper construction as described by President Eisenhower.

- A description of a unique codification practice that led to the sole specific exemption for the office of Attorney General (§ 508) in the Vacancies Act, the precursor to FVRA. And an explanation for why other statutes were not each listed as exempt, but functioned similarly.

- An explanation for why that sole exemption was removed by FVRA, as well as how and why its § 3347 expanded the number of statutes that were exempted and retained as controlling.

- An explanation for how a heavily relied on quote from a Senate Report, stating FVRA might be used as an alternative appointment vehicle, came to be. Also, why that cannot be the case.

- Practical illustrations of how FVRA was intended to function in conjunction with other appointment statutes, as well as absurd situations that would result if FVRA was accepted as an alternative to other automatic succession statutes.

- An analysis that refutes key points relied upon by DOJ's Office of Legal Counsel and distinguishes key court cases that have issued opinions on related matters.

- A harmonious reading of the two key statutes and an explanation of why they do not conflict. That statutory construction is then supported by key interpretative canons and further affirmed by context and ample legislative history.

- Overall, the article concludes, on the basis of statutes alone, that the appointment is unlawful.

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FVRA CANNOT BE USED TO APPOINT AN ACTING ATTORNEY GENERAL

By: Stephen Migala[†]

Abstract

The President's appointment of Mr. Whitaker to serve as Acting Attorney General is unprecedented and calls into question several distinct legal issues. Though most are based on questions of constitutionality under Article II, there is a strong and novel legal argument that the statute used by the President to make the appointment, FVRA, may not be used in such a way. Instead, a separate statute, 28 U.S.C. § 508, compels the Deputy Attorney General to take charge of the department. As a result, this article alleges that the person leading the DOJ has no authority to do so. Contrary to some arguments, FVRA may not be used in lieu of or as an alterative to § 508. This article traces why that is so and sets forth new arguments and documents to conclude that, on the basis of statute alone, the appointment cannot stand.

Introduction

The day after a national congressional election, the President took an unprecedented action. By appointing Matthew Whitaker as Acting Attorney General, the President, for the first time in modern U.S. history, since at least 1870, elevated someone to the position of Attorney General (AG) who has not faced any kind of confirmation by the U.S. Senate. This, by itself would be alarming and legally suspect on several distinct grounds rooted in statute and the U.S. Constitution.

However, rather than addressing grave constitutional questions that courts tend to consider last or altogether avoid, this article aims to focus on a principal and dispositive argument that has been overlooked: the statutory law used by the President to appoint Mr. Whitaker to become Acting Attorney General—the Federal Vacancies Reform Act (FVRA)—may not be used to appoint someone to act as Attorney General. Instead, the authority to act as Attorney General is derived from one statute alone: 28 U.S.C. § 508. That authority automatically vests the power to act in the Deputy Attorney General and several other Senate-confirmed Department of Justice (DOJ) officials in a delineated sequence. It is not subject to Presidential discretion, it is not subverted or displaced by FVRA, and most significantly, the President may not choose between FVRA and § 508 to create two different paths to designate an Acting Attorney General.

[†] Stephen Migala is an attorney based in the District of Columbia and earned a J.D. and an LL.M. in National Security Law from Georgetown Law. He expresses personal opinions not tied to or made on behalf of any entity. This version is a draft and has been submitted for publication. This SRRN link have its target page updated to point to a PDF of the published version, once available. In the meantime, the author welcomes comments and critiques through SSRN.

This article will show that since at least 1873, all prior versions of FVRA, generally known as "Vacancy Acts," gave presidents broad discretion to appoint Senate-confirmed officers—but they have always specifically excluded only one office from that broad authority: the office of Attorney General. The most recent version of the Vacancy Act, FVRA, aimed to continue that long-standing and unquestioned axiom. While the text of FVRA omitted a 125-year-old, specific clause recognizing that the office of Attorney General was not subject to the discretionary appointment provisions in the Vacancy Acts, it added a new clause instead with a much broader sweep in order to expressly retain more statutes like § 508 across more U.S. agencies and departments. Congress did not, as some suggest, implicitly abandon a 125-year explicit understanding and practice without any statutory text or even a hint of a discussion. Rather, evidence shows that Congress believed that another new section of FVRA, § 3347(a)(1), would continue to exempt automatic-vesting statutes like § 508.

A close reading of FVRA contextualized by its statutory evolution, the perceived ill the law attempted to remedy, key floor speeches by its principal authors, contemporaneous congressional memos and transcripts just made available from the National Archives, as well as a plain-text comparison of the principal statutes and how they were meant to work together, will all point to a firm conclusion: FVRA cannot be used to override the automatic, specific, and required authority to act as attorney general contained in 28 U.S.C. § 508.

Separately, a simple observation will also lead to the same conclusion: the difference in permissive and automatically vesting appointment statutes—a difference between "may" and "shall"—easily explains how FVRA is meant to work alongside some statutes that are discretionary, but not others like § 508 that are mandatory. With this understanding, primary canons of statutory construction such as avoiding implicit repeals of other statutes and reading two statutes harmoniously can be followed. More importantly, the plain text and the principal intent of both FVRA and § 508 would be honored. Put together, it will be clear that only § 508 applies to the position of Acting Attorney General.

The consequence of this conclusion is immense and it is not made lightly. It means that the law the President relied on to appoint Mr. Whitaker, and on which Mr. Whitaker's authority relies, cannot be used. It also means that the President has no authority or discretion to subvert the automatic order of succession commanded by Congress. Consequently, actions undertaken by the Department of Justice could be reversed or vacated, depending on Mr. Whitaker's involvement as the purported Acting Attorney General. At the same time, it means that the Deputy Attorney General is the sole person authorized by statute to head the Department of Justice and to act as Attorney General in case of vacancy.

Roadmap

To be able to conduct a thoughtful analysis, the key statutes, as they currently stand, must first be understood. To aid in this preliminary step, Parts I.A and I.B introduce relevant parts of the two main statutes at issue: (1) 28 U.S.C. § 508, which sets forth an automatic order of succession; and (2) FVRA, which broadly allows the President to fill certain kinds of vacancies subject to certain limitations, 5 U.S.C. §§ 3345–3349d.

Those familiar with the statutes may wish to begin at Part II, where a deeper dive is taken into both laws. There, the history of each act and other contextual information is tied together to show a clear and long-standing axiom that § 508 cannot be displaced or avoided in favor of a Vacancies Act. With a grasp of how steadfast that proposition was, it will become difficult, if not impossible, to believe that what would have been a profound change was made implicitly and without any discussion. Afterwards, a simple explanation is offered for how to construe the two statutes in a way that keeps the long-standing axiom, avoids any notion of an implicit repeal, and removes any notion of displacement or conflict between the two harmonious laws. One category of statutes is discretional and may work alongside FVRA. The other category of statutes, which includes § 508, is automatic and mandatory, and may not be avoided by choosing to invoke FVRA. Next, practical examples are offered to show how this article's conclusions can be applied. Those conclusions are then tested against the strongest counterarguments, DOJ Office of Legal Counsel opinions, and case law to highlight some inaccurate assumptions and errors in reasoning that led some to believe FVRA could be applied.

Finally, the article's conclusions are restated in Part III. There, suggestions are recast for how to conceptualize categories of statutes that are meant to work alongside FVRA and those like § 508 that cannot.

For ease of reference and to better follow the analysis—especially in light of this article's deep reliance on textual comparisons of statutes and their respective histories—several appendices are also presented. They offer a chance for context, immediate side-by-side comparisons of relevant provisions, and an easy-to-follow depiction of their evolution and changes in language over time.[1] Additionally, a "TOC" link atop each page takes the reader to the table of contents, which is itself linked to different sections, for easier navigation. A primer and basic textual analysis on the two key statutes begins next.

I. AN INTRODUCTION TO THE RELEVANT STATUTES

A. The DOJ's Organic Succession Statute for an Acting Attorney General (§ 508)

The office of Attorney General has, since 1870, been mandated by the DOJ's founding or "Organic" act to have a strict order of succession. The statute identifies specific officials, all of whom have been confirmed by the Senate, to automatically assume a vacancy in the office of the Attorney General. It immediately vests power in those specified officers and it is not subject to the same discretion the President generally has to fill vacancies in other offices. In other words, it cannot be displaced, either directly or indirectly. Since the birth of the Department of Justice, Congress has given the office of Attorney General this unique and constant exemption. So

[1] Appendix A traces the evolution of the law grating the Solicitor General the power to become Acting Attorney General. Appendix B traces the transformation of that law amid Reorganization Acts in the 1950s to transfer that authority to the Deputy Attorney General and become codified at 28 U.S.C. § 508. Next, Appendix C traces the evolution of the Vacancy Acts. Appendix D offers a comparison of the most recent changes FVRA made to the prior Vacancy Act. Appendix E reproduces heretofore unseen legislative history concerning key aspects of FVRA recently made available at the National Archives after a usual 20-year embargo. Finally, Appendix F charts and excerpts key language from all of the appointment or automatic-designation statutes that were included in the Senate Report on an earlier version of FVRA and then reproduces the 1998 CRS memo used to make the list.

important is the position, that in case of vacancy of a primary designated officer, many more are specifically identified in an order of succession. Today, that core 1870 authority has remained untouched, unrepealed, and as will be shown, unaffected by FVRA. It rests at 28 U.S.C. § 508 and states in relevant part (with added underlining for emphasis):

> §508. Vacancies
>
> (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 [FVRA] the Deputy Attorney General is the first assistant to the Attorney General.
>
> (b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

Immediately, to avoid brewing a misconception, it is worth flagging that some have been confused by the "may" provision in subsection (a). As will be explained in more detail in Part II.A, this term "may" is not the law, and it does not denote a possibility that a confirmed Deputy Attorney General might not become Acting Attorney General in case of vacancy. Rather, it was a stylistic choice by codifiers to use different words when the source law was incorporated into title 28 of the U.S. Code.[2] The source law used the words "shall have power" and stated that power was "vested."[3] The current law's principal author, President Eisenhower, intended the automatic assumption of a vacant office of the Attorney General to be a "requirement." Thus, for this statute, note, but do not rely on the use of the word "may."

The more important thing to remember is the "shall act" provision in subsection (b) and the overall import of the section. As is evident by its text, this entire section ultimately means to have some Senate-confirmed DOJ officer serve as Acting Attorney General in case of vacancy. The only question is whether the designated officer is in office, and if the office is empty, who is next in the already-determined automatic order of succession. Legislative histories and previous versions of the law all firmly support that textual and common-sense reading.

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[2] H.R. REP. NO. 89-901, at 182 (1965) [hereinafter House Report on 1966 Codification] (stating that in § 504, which renamed the 1903-created position of an assistant to the AG to "Deputy Attorney General," the codifiers, made only non-substantive stylistic changes; in that section: "The words 'may appoint' are substituted for 'is authorized to appoint.'"); *id.* at 184 (stating that with regard to § 508, "[t]he word 'may' is substituted for 'have the power.'; but not, however, noting or addressing the stylistic choice to omit the word "shall"). While the 1966 law was used to codify title 5 into positive law, it also transferred provisions that were formerly arranged in title 5 to other titles. Section 4 of the 1966 law transferred what would become § 508 into title 28. Like all changes made in the law, the House Report stressed "no substantive change[s]" were made. *Id.* at 1, 3.

[3] *See infra* Appendix A and discussion Part II.A.

B. The Statute Used to Appoint the Acting AG: FVRA

1. FVRA Offers Three Paths to Appointment as an Acting Officer

The statute used by the President to justify appointing Mr. Whitaker to Acting Attorney General and head of the Department of Justice is called the Federal Vacancies Reform Act of 1998, or FVRA for short. Vacancy Acts have existed in one form or another since 1792.[4] And the version in place today can be traced directly back to 1868,[5] even before the beginnings of § 508. FVRA is codified at 5 U.S.C. §§ 3345–3349d. Distilled, it offers three paths to fill a vacancy in what is known as a "PAS" office (those requiring Presidential appointment and Senate confirmation):

- (a)(1) The first is the default provision, which requires no action from the President; it states that the "first assistant" *shall* perform the duties of the vacant office (in the case of the office of Attorney General, a separate statute confirms the first assistant to be the Deputy Attorney General (28 U.S.C. § 508));

- (a)(2) The second path may displace the first default path at the discretion of the President, who may instead designate a person currently serving in any office that required Senate confirmation (a PAS officer);

- (a)(3) The third is a more recent option, added in 1998, that allows the President to displace the default provision, so long as the chosen designee is an officer or employee of the same agency, who, during the last year, has served for at least 90 days in a position paid to a level of at least a GS-15. This was the option employed by the President to appoint Mr. Whitaker, who met the requirements of this provision.

2. FVRA Conveys Nearly All Usual Powers to Acting Officers

A person appointed or assuming office through any one of these three paths retains all "functions and duties" of the office as if the acting officer had been confirmed by the Senate. Those powers include all specific statutory requirements and responsibilities of the Attorney General established either by statute or regulation.[6]

Acting officers only have a few minor differences from Senate-confirmed officers. They include retaining the pay of their former post, not having the honorific of a formal commission, and not being eligible for succession under the 25th Amendment.

3. FVRA Time Limits for Acting Officers

There are time limitations imposed for an acting officer under FVRA. They can be summarized as a baseline of 210 days, with an additional 210 days added if a different person is

[4] Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.
[5] Act of July 23, 1868, ch. 227, 15 Stat. 168.
[6] 5 U.S.C. § 3348(a)(2).

nominated to the Senate but not confirmed, and yet another 210-day period if the same occurs. That totals 630 possible days outside of the confirmation process proscribed by the Constitution. When the vacancy occurs with the change of a new Executive administration, the time periods are even longer.

For now, the troubling time period that FVRA allots will not be analyzed against the Constitution's Appointment Clause under Article II, nor under its Recess Appointments Clause. As has been noted already, courts typically do not reach constitutional questions if issues can be resolved by statute and this article attempts to follow that axiom. Needless to say, several viable arguments exist that the recently-extended FVRA timelines frustrate, undermine, or especially for option (a)(3), impermissibly avoid the Constitution's requirements. The timing for acting officials under various iterations of the Vacancy Acts have evolved in this way: 1792, no limit; 1795, six months; 1863, six months; 1868, 10 days; 1891, 30 days; 1988, 120 days, with two additional 120-day periods; and 1998, with 210 days, two additional periods, and more time for new administration transitions.[7]

4. FVRA Penalties for Improper Action

Allowed to go uncorrected, an illegal assumption of acting office has severe consequences for the U.S. government: According to case law,[8] the Administrative Procedure Act,[9] and FVRA itself,[10] actions by officials improperly assuming office have no force or effect in law. Nor can they later be ratified.[11]

Consequently, if a court agrees that Mr. Whitaker has illegally assumed an office that automatically belongs to the Deputy Attorney General (DAG), vast swaths of approvals and other important decision-making stand to be affected. Mr. Whitaker could essentially have Sadim's Touch, ruining anything he inspects or approves.

5. FVRA Exemption

Section 3347 of FVRA is as significant as any other provision of law for the purposes of this analysis. Meant to override provisions in organic department acts that give broad, generalized, discretionary, and unspecified appointment power to department heads, it attempts a

[7] Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (1792); Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 (1795); Act of Feb. 20, 1863, ch. 45, 12 Stat. 656 (1863); Act of July 23, 1868, ch. 227, 15 Stat. 168 (1868); Act of Feb. 6, 1891, ch. 113, 26 Stat. 733 (1891); Pub. L. No. 89-554, 80 Stat. 378, 426 (1966) (codification act carrying no changes); Pub. L. No. 100–398, § 7(b), 102 Stat. 985, 988 (1988). Note too, that the time periods varied depending on sickness, death, resignation, and other qualified conditions to trigger various Vacancy Acts.

[8] *E.g.*, *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd* 134 S. Ct. 2550 (2014) (holding that without a valid appointment, an enforcement order was "void ab initio").

[9] 5 U.S.C. § 706 (holding unlawful and setting aside agency actions found to be, among other things, not in accordance with the law, without observance of procedure, or in excess of statutory authority).

[10] 5 U.S.C. § 3348(d)(1) ("An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.").

[11] While FVRA so holds, if, as this article argues, FVRA does not apply, then its punitive provision and non-ratification provision would also likely not apply. In such a case, later ratification of action by Mr. Whitaker may be possible. *E.g.*, *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998).

common legislative tactic called "catch and release" to ensure FVRA is considered first and before other legislation.[12] The word "exclusive" is FVRA's attempt to "catch all" other laws regarding appointment. It then lists two primary ways, in paragraphs (1)(A) and (1)(B), to "release" its primacy and not override other laws governing appointment it did not mean to displace.[13] Section 3347's relevant parts read:

> (a) [Prior FVRA sections] are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office . . . . unless–."
>
> (1) a statutory provision expressly-
>
> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate . . . .
>
> (b) Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

Subsection (b) and the types of statutes it precludes was the primary focus of FVRA. Known as "general housekeeping" statutes, these provisions were widely used by most department heads to appoint persons to Senate-confirmable (PAS) positions. The Justice Department had consistently used its "housekeeping" statutes at 28 U.S.C. §§ 509 and 510,[14] to avoid the confirmation process and drew the ire of the Senate. Legislative history is abundantly clear that FVRA's primary aim was to target these "housekeeping" statutes, especially §§ 509 and 510—but § 508 was to remain controlling and unaffected.[15]

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[12] *E.g.*, "Specially Designed'" Definition, 77 Fed. Reg. 36,409, 36,411 (June 19, 2012) https://www.federalregister.gov/d/2012-14475/page-36411.

[13] The drafters of FVRA specifically stated that such laws would be "retained." S. REP. NO. 105-250, at 15–16 (1998); *see also id.* at 11 (describing one of the first amendments adopted by the committee was that of Senator Lieberman, who "offered an amendment to retain existing statutes that by their own terms provide for a process for filling of specific advice and consent positions"). For the purposes of this article, "release" and "retain" mean the same end result: the other statute is not overridden and then must be read in parallel, according to well-established canons of statutory construction.

[14] 28 U.S.C. § 510 ("The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.").

[15] *E.g.*, 144 Cong. Rec. S12,824 (daily ed. Oct. 21, 1998) (statement of Senator Byrd: "Moreover, in an effort to squarely address past problems, the Act specifically prohibits the use of general, ''housekeeping'' statutes as a basis for circumventing the Vacancies Act. Provisions such as, but not limited to, 28 U.S.C. 509 and 510, which vest all functions of the Department of Justice in the Attorney General and allow the Attorney General to delegate

C. FVRA and Automatic Succession Statutes: Catch and Release

With respect to the applicability of § 508 and its interplay with FVRA, subsection (a)(1) is key. It is best viewed as an escape clause, or the "releasing" mechanism to accompany the "catch-all" term "exclusive" used earlier. First, the statute "catches" the entire universe of temporary appointments and places them within the rubric of FVRA. Next, the "unless" clause followed by subsection (a)(1) "releases" two categories of existing statutes from its grasp and retains them: types under (1)(A) and types under (1)(B).

- The first type of statute, those that fall under (1)(A), encompass those that authorize someone the *discretion* to appoint an *unspecified* person to a specific office: "authorizes [the President, court, or department head] to designate an officer or employee."

This is usually stated in a way that says "the President may appoint . . . ."[16] In such a case, the authorized officer is allowed discretion not only as to whom to appoint, but whether to appoint anyone at all. It is permissive. The officer may, or may not, choose to appoint.

If the authorized officer does not choose to use the (1)(A)-type statute, then the President may use FVRA, which also happens to be discretionary and permissive: "the President . . . may direct."[17] Since both the (1)(A) statute and FVRA are discretionary, an appointment under one law can be made without violating the other. In other words, there is no conflict of laws created by choosing from two permissive statutes. Courts appear to be in consensus on this issue, and they routinely identify these "(1)(A)-type" statutes as permissive and elective, resulting in a choice to use either.[18] The same, however, is not true for (1)(B).

- The second type of statute, those that fall under (1)(B), encompass those that *automatically* vest power for a *specified* officeholder to act in a specific office: "designates an officer or employee to perform."

Section 508 is just such a statute. It requires a *specified* officeholder, in this case followed by a further specified order of officeholders from the Deputy Attorney General to others, to automatically act in a specific office, the office of Attorney General. This (1)(B)-type statute, like its companion (1)(A)-type statute, is similarly "released" from the "exclusive" catch-all of

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responsibility for carrying out those functions, shall not be construed as providing an alternative means of filling vacancies."); S. REP. NO. 105-250, at 10 (1998) (describing the need for and legislative history of what became FVRA).

[16] An example of this kind of "may appoint" discretion is found at 28 U.S.C. § 546 ("[T]he Attorney General may appoint a United States attorney."). That statute pertaining to U.S. Attorneys was specifically identified as the kind that the draft FVRA would retain. S. REP. NO. 105-250, at 16–17 (1998) (listing around 40 such statutes).

[17] 5 U.S.C. § 3345(a)(2), (3). Note that the whole of § 3345 applies only to appointments required to be made by the President and the options may only be made by the President. This article does not here opine on what would occur if the vacancy is not one that the President is authorized to appoint, subject to confirmation by the Senate.

[18] *See, e.g.*, *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016) (public link) (holding that under (1)(A), an NLRB-related statute that allows an unspecified person to be appointed to act as general counsel, does in fact escape FVRA's exclusivity clause, and permits the President to "elect between these two statutory alternatives to designate [the position]."). For reasons described later, the same would not hold for (1)(B).

subsection (a). But that is where the similarity ends. Since (1)(B)-type statutes are usually automatic and immediately vest power by default in case of a vacancy, they do not carry any discretion. Nor are they permissive. They are required and cannot be ignored or not used based on someone's discretion. Accordingly, if they are not followed, they are violated.

The key difference between (1)(A)- and (1)(B)-type statutes will be repeatedly stressed by this article: while both types of statutes are "released" from FVRA, (1)(B)-type statutes cannot be discarded in favor of using FVRA's authority because they contain mandatory appointment limits that automatically vest. In other words, unlike the situation in (1)(A), where neither FVRA or the referenced statute is violated by the discretionary choice to use either (a "may appoint" choice), using FVRA in lieu of the (1)(B) statute directly violates that referenced statute (which often uses the word "shall"), even if it does not violate the permissive FVRA.

Thus, the only way to avoid creating an unnecessary conflict between laws, is to choose the construction that does not violate either: a harmonious reading.[19] For permissive (1)(A)-type statutes, either they or FVRA may be used. For required or automatic (1)(B)-type statutes, ignoring them to use FVRA would violate those source statutes.

This plain-text reading makes the most practical sense too, and it avoids a silent implied repeal of not just § 508, but of many other statutes across many agencies and departments that automatically vest acting authority in a specified officeholder. This reading also finds clear support in the legislative history of FVRA, and in every other post-1870 version of the Vacancies Act, all of which had a specific clause excluding the office of Attorney General from the President's otherwise broad appointment powers. To complement that history, consider next how strongly it was known for over 125 years that § 508 could not displace or be used in lieu the Vacancies Act, which was always similarly intended to be broadly applicable. The history, backgrounds, and context of both key acts at issue are analyzed next in further detail.

[19] *E.g.*, *Howard v. Pritzker*, 775 F.3d 430, 437 (D.C. Cir. 2015) ("'Statutes are to be considered irreconcilably conflicting where 'there is a positive repugnancy between them' or 'they cannot mutually coexist.' *Radzanower v. Touche Ross & Co*., 426 U.S. 148, 155 (1976). ''Repeal is to be implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'' *Id*. (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)). As a corollary, 'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' *J.E.M. Ag Supply, Inc. v. Pioneer Hi–Bred Int'l, Inc*., 534 U.S. 124, 143–44 (2001) (internal quotation marks omitted). 'The courts are not at liberty to pick and choose among congressional enactments,' *Morton v. Mancari*, 417 U.S. 535, 551 (1974), and deeming two statutes to conflict is "a disfavored construction,' *Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir.1 997) (citing *Digital Equip. Corp. v. Desktop Direct, Inc*., 511 U.S. 863, 879 (1994)). Thus, upon concluding that "[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situation,' *Radzanower*, 426 U.S. at 155, the Supreme Court has 'decline[d] to read ... statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress,' *Watt v. Alaska*, 451 U.S. 259, 265 (1981).'"); *English v. Trump*, 279 F. Supp. 3d 307, 324 (D.D.C. 2018) ("The Court is also guided by … principles of statutory construction in reaching its conclusion. The first is the harmonious-reading canon. '[I]f by any fair course of reasoning the two [statutes] can be reconciled, both shall stand.'").

II. A More Detailed Analysis

With the text of the current FVRA introduced and explained, and with the DOJ's organic and automatic appointment act also previously introduced, vital context can now be considered and analyzed to strengthen the conclusion that § 508 is the sole appointment vehicle for one to act as Attorney General.[20] While this article asserts this conclusion can be independently made based on a harmonious plain-text reading that avoids an unnecessary conflict, to be thorough, it will also turn to canons of construction, context, history, contemporary understandings, and intent, in the same way a court would when the text of an act, or two acts together, are unclear.[21]

A. History of Section 508: An Automatic Acting AG Based on a Specific Statute

It is clear that as far back as 1870, when the Department of Justice was first created, Congress always intended for only certain specified and confirmed DOJ officials to lead the department in case of vacancy.[22] At the birth of DOJ, that official was the Solicitor General (SG). As will be explained below, the automatic authority that was first given to the Solicitor General was later transferred to other officials as the department expanded and as Congress created new senior-level positions. As a result of decades of evolution and expansion in the department, that automatic-acting-authority statute, now known as § 508, was reworded several times, sometimes awkwardly by codifiers, to include the newly created senior positions in the order of succession. However, § 508's central principle of automatic vesting authority never waivered through all that time, only the recipient of that power changed. Once traced, an objective reader will see that today the authority remains steadfast. It vests first in the Deputy Attorney General, next in the Associate Attorney General, and then to either the Solicitor General or several Assistant Attorneys General, in an order determined by the Attorney General.

Begin at that same 1870 Organic Act establishing DOJ.[23] Beyond creating the department, the act also created the new, required position of Solicitor General. The act required that the Solicitor General be an "officer learned in law," and it immediately gave automatic authority to the Solicitor General to act as Attorney General in case of vacancy: "[The Solicitor General] in case of a vacancy in the office of Attorney-General, or in his absence or disability,

[20] *E.g.*, *Rizo v. Yovino*, 887 F.3d 453, 462 (9th Cir. 2018) ("Although 'the authoritative statement is the statutory text,' the legislative history of the [Act] further supports our interpretation." (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005)); *id*. ("[T]he way in which Congress arrived at the statutory language" can provide 'a better understanding of the [statutory] phrase' in question than 'trying to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports.'" (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 198 (1974))).

[21] *E.g.*, *United States v. Libby*, 429 F. Supp. 2d 27, 32 (D.D.C. 2006) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. . . . Although 'literal interpretation [of the statute] need not rise to the level of 'absurdity' before recourse is taken to the legislative history ... [,] there must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning" (internal citations omitted)).

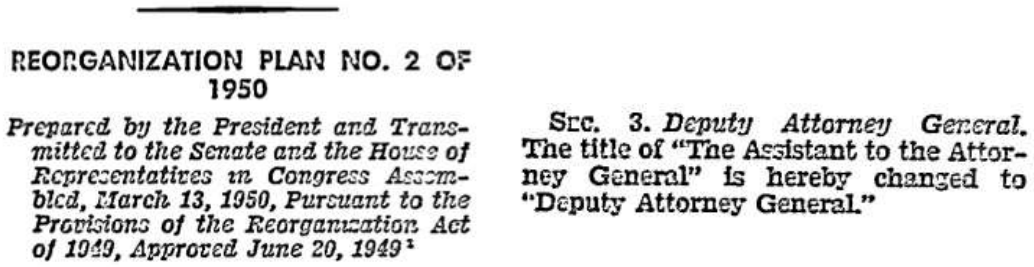
[22] Act of July 20, 1870, ch. 150, § 2, 16 Stat. 162.

[23] *Id.*

shall have power to exercise all the duties of that office."[24] That 1870 law remained exactly the same until 1953.[25]

Then, in the 1950s, Presidents Truman and Eisenhower, using specific authority granted to the presidency by Congress, reorganized and made significant changes to several agency departments.[26] As presented visually in figures below, as well as in Appendix B, the Department of Justice was relevantly affected by two Reorganization Plans: No. 2 of 1950 and No. 4 of 1953. Those Reorganization Plans carried the full weight of law and were incorporated into both the statutes at large and the U.S. Code.[27]

Reorganization Plan No. 2 of 1950 took a 1903-created and Senate-confirmable office of "assistant to the Attorney General"—one which was permissive and was not required to be filled—and changed its name to "Deputy Attorney General."[28] That office had traditionally been known as the "first assistant position" to the Attorney General. However, despite that redesignation, the provision from DOJ's Organic Act empowering the Solicitor General to act as Attorney General still remained as law.



REORGANIZATION PLAN NO. 2 OF 1950

Prepared by the President and Transmitted to the Senate and the House of Representatives in Congress Assembled, March 13, 1950, Pursuant to the Provisions of the Reorganization Act of 1949, Approved June 20, 1949[1]

SEC. 3. *Deputy Attorney General.* The title of "The Assistant to the Attorney General" is hereby changed to "Deputy Attorney General."

Figure 1: The relevant excerpts of Reorganization Plan No. 2 of 1950.

[24] *See also* Revised Statutes of the United States, R.S. § 347 (1878), https://babel.hathitrust.org/cgi/pt?id=uiug.30112046463706;view=1up;seq=141.

[25] *See* 5 U.S.C. § 293 (1952). Appendix A, *infra*, also reproduces various iterations of the law so that they may be easily traced and compared.

[26] Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203 (1949). Under the Reorganization Act, the President transmitted plans to Congress for either no action and consequentially approval, or disapproval.

[27] *E.g.*, 5 U.S.C. § 291 (1958) (stating the codified laws to date, but supplementing as notes the provisions of the Reorganization Plan). The Reorganization Act of 1949, Public Law No. 81-109 (63 Stat. 203), gave the President authority to create efficiencies and eliminate redundancies. One of several areas Congress directed any plan to consider was "the authorization of any officer to delegate any of his functions." *Id.* at § 3(5). The 1949 Act, like many other Reorganization Acts of the era, allowed a president to submit a plan to Congress within a certain amount of time, and, if no chamber passed a resolution disapproving of the plan, it would become law. The 1949 Act was ultimately extended eight separate times. One of those extensions, 67 Stat. 4, provided the authority for the other pertinent plan, Reorganization Plan No. 4 of 1953.

[28] Act of Mar. 3, 1903, ch. 1006, § 1, 32 Stat. 1062 (1903) ("[T]he President is authorized to appoint, by and with the advice and consent of the Senate, an assistant to the Attorney-General. . . . and an Assistant Attorney-General [at a lower rate of pay]."); Reorganization Plan No. 2 of 1950, § 3, 15 Fed. Reg. 3173 (1950), 64 Stat. 1261 (1950) ("The title of 'The Assistant to the Attorney General' is hereby changed to 'Deputy Attorney General.'"). Later, in the 1966 codification of title 5, the revisors, without intending any substantive change in law, opted to change "is authorized to appoint" from the 1903 law, to "may appoint" in the newly-formed § 504 regarding the position of Deputy Attorney General. *E.g.*, House Report on 1966 Codification *supra* note 2, at 182.

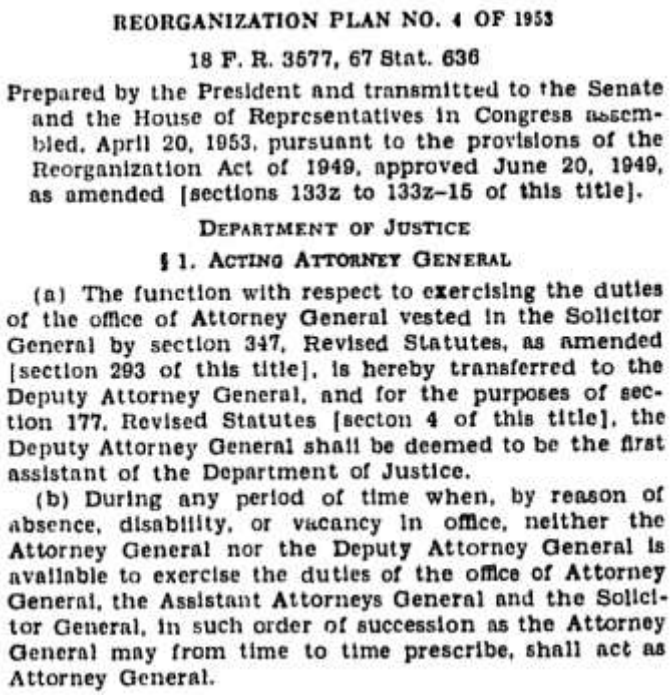
Thus, for about three years after the 1950 Plan, the Solicitor General would have the power to act as Attorney General, but the Deputy Attorney General was the first assistant and in any other department would have had automatic acting powers under the Vacancies Act. As a result, it was not unequivocally clear who the second-ranking DOJ official was or which official was best suited to act as Attorney General.[29] The next relevant reorganization plan prevented any potential confusion and moved the authority to act as Attorney General from the Solicitor General to the Deputy Attorney General.

Reorganization Plan No. 4 of 1953 specifically stated that the powers "vested" in the Solicitor General to act as Attorney General were transferred to the Deputy Attorney General.[30] The Plan also stated that for the purposes of the Vacancies Act, the Deputy Attorney General "shall be deemed" to be the "first assistant." Consequently, it appears evident that what is now § 508(a) was meant to transfer power to the Deputy Attorney General and to specify, by reference to the Vacancies Act, that he or she was DOJ's second-in-command.

Rather than only designate one successor, as all Vacancy Acts had done, Reorganization Plan No. 4 designated a line of successors by law. The Plan, later codified at § 508(b), set out a longer order, supplemented by an Attorney General's designation, and named with specificity which officer would act as Attorney General. The text of the Plan is depicted in Figure 2, below.

[29] *See* H.R. Doc. No. 83-130 (1953) (an April 20, 1953 message from the President to Congress to accompany transmittal of Reorganization Plan No. 4 of 1953 concerning DOJ) ("Under present law the Solicitor General is required to exercise the duties of the Attorney General in case of the absence or disability of the latter, or in case of a vacancy in the office of Attorney General. . . . The Solicitor General is no longer the appropriate officer of the Department of Justice to be first in the line of succession of officers to be Acting Attorney General. . . . The Department of Justice now has a Deputy Attorney General, provision for that title having been made in Reorganization Plan No. 2 of 1950. The duties of this officer include supervision over all major units of the Department of Justice and over United States attorneys and marshals. . . . He is, both by title and by the nature of his functions, the officer best situated to act as the administrative head of the Department of Justice when the Attorney General is absent or disabled or the office of Attorney General is vacant."); *see also infra* Appendix B (reproducing same).

[30] Reorganization Plan No. 4 of 1953, 67 Stat. 636 (1953).



REORGANIZATION PLAN NO. 4 OF 1953

18 F. R. 3577, 67 Stat. 636

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, April 20, 1953, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949, as amended [sections 133z to 133z–15 of this title].

DEPARTMENT OF JUSTICE

§ 1. ACTING ATTORNEY GENERAL

(a) The function with respect to exercising the duties of the office of Attorney General vested in the Solicitor General by section 347, Revised Statutes, as amended [section 293 of this title], is hereby transferred to the Deputy Attorney General, and for the purposes of section 177, Revised Statutes [secton 4 of this title], the Deputy Attorney General shall be deemed to be the first assistant of the Department of Justice.

(b) During any period of time when, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

Figure 2: The relevant text of Reorganization Plan No. 4. After the 1966 codification of title 5, it would become the modern-day § 508. *See also* Appendices A–B, *infra*, for the complete evolution of this act.

In 1966, Congress enacted and reorganized title 5 into positive law.[31] As part of the massive effort, the 1870 automatic succession provision—as modified by Reorganization Plan Nos. 2's and 4's designation of a new senior DOJ rank structure—was codified into its current location at § 508.[32] As can be seen by comparing Figure 2 to current text, and as the codifiers specifically and repeatedly stated within the codification statute, it "made no substantive changes."[33] That is why revision notes accompanying the Code's section describe only what were intended to be minor and stylistic changes.[34]

[31] Pub. L. No. 89-554, 80 Stat. 378 (1966).

[32] 80 Stat. at 612. *Compare* 5 U.S.C. § 293 (1958) and accompanying notes regarding Reorganization Plans, *with* 80 Stat. at 612 (incorporating those notes with existing Code sections in a new codification). This article's Appendices A and B, *infra*, offer excerpts for ease of comparison.

[33] House Report on 1966 Codification, *supra* note 2, at 1 ("The purpose of this bill is to restate in comprehensive form, without substantive change, the statutes in effect before July 1, 1965 that relate to . . . and to enact title 5 of the United States Code. In the revised title 5 simple language has been substituted for awkward and obsolete terms . . . ."); *see also id.* at 3 ("[T]here are not substantive changes made by this bill . . . . In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged."); *see also Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 210 (D.C. Cir. 1998) ("No 'substantive changes' were intended [in the 1966 recodification]." (quoting S. REP. NO. 89–1380, at 20, 70–71 (1966))). Again, the same was true for provisions moved from title 5 to title 28 by this law. *See supra* note 2.

[34] The Office of Law Revision codifiers, specifically note at the bottom of today's § 508, that wording was changed by the codifiers, and that the 1870 law, "R.S. § 347 is cited as authority inasmuch as the function contained therein [referencing the automatic authority to act as AG] was the function transferred to the Deputy Attorney General….The word "may" is substituted for "have the power." Again, no explanation was offered for why "shall" was omitted.

Significantly, the small wording changes, including "may," which give some pause are not a part of the actual source law and cannot hold legal weight.[35] The source law—being the authority vested in the Solicitor General and then transferred by Reorganization Plan No. 4—controls: The Deputy Attorney General "shall have the power" to act as Attorney General in case of vacancy. Words like "may" were only inserted by the codifiers in an attempt to reduce and simplify wording.[36]

Thus, the history of § 508 and the DOJ Organic Act teaches three main relevant lessons. One, is that the insertion of the reference to the "first assistant" and what was then the location of the Vacancies Act was meant more to elevate the newly named position of Deputy Attorney General above the Solicitor General and establish the office as the second-in-command. It was not meant to give him or her any separate authority under the Vacancies Act.[37] In fact, President Eisenhower's message accompanying the plan bears no mention of the Vacancies Act, only a distinct order of succession.

The history of the Vacancies Act also supports this assertion. As will be explained next in more detail, Revised Statute (R.S.) § 177,[38] the location of that era's FVRA, offered the same automatic assumption of office by a first assistant that remains today. For most other offices, that automatic assumption was subject to the discretion of the President, who could use the Vacancies Act to appoint a different person. But R.S. § 179 placed a sole and vital limit on that discretion: it could not apply to the Acting Attorney General. Accordingly, in light of the explicit exemption still in place in 1953, there could be no "tie-in" to the Vacancies Act in § 508. And that FVRA replaced the Vacancies Act in the referenced Code location does not somehow alter the meaning of the 1953-enacted § 508. The reference to the location of the Vacancies Act in the Code was merely used as a familiar measuring stick that would signify the new and elevated second-in-command status of the Deputy Attorney General.

The second lesson learned is that the position of Deputy Attorney General was not required; however, if filled, the officeholder would be required to act as Attorney General. Originating in 1903 and then changed in name and seniority by the Reorganization Acts, the

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[35] Source law controls, even over the U.S. Code in the context of a positive-law codification statute. *E.g. Port Auth. of New York & New Jersey v. Dep't of Transp*., 479 F.3d 21, 41 (D.C. Cir. 2007) ("[I]t is well established that language revisions in codifications will not be deemed to alter the meaning of the original statute."); *United States v. Ryder*, 110 U.S. 729, 740 (1884) ("It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed.").

[36] Although not specifically stated by § 508, it appears likely that there is alternative supporting rationale for the inclusion of the word "may." As is still the case in § 504, the position of then-assistant to the Attorney General, now Deputy Attorney General was always an optional position. Presidents and Attorneys General could choose not to fill it. Therefore, including "may" in 508(a), apart from being an incorrect recasting of the source law, could have been inserted to reflect the contingency that the position—equivalent to the "first assistant"—could be vacant. In such a case, now-§ 508(b) would offer a longer list of automatic officers to act as Attorney General. It would help explain why DOJ has such a long list in the first place. Either reasoning has nothing to do with any deeper meaning that "may" might have, nor does it denote any option on the part of the Deputy Attorney General not to assume the office. Source law indicates he "shall" "have the power" of the office of Attorney General.

[37] Dwight D. Eisenhower, Special Message to the Congress Transmitting Reorganization Plan 4 of 1953 concerning the Department of Justice - April 20, 1953, 1953 Pub. Papers 188–91 (1953), https://heinonline.org/HOL/Page?collection=presidents&handle=hein.presidents/ppp053000&id=230&men_tab=srchresults (Hein Online subscription required).

[38] R.S. § 177 (1874) (codifying the DOJ Organic Act provision to act as AG); R.S. § 177 (1878) (same).

position of Deputy Attorney General was—and to this day still is—elective at the discretion of the President.[39] As 28 U.S.C. § 504 states: "The President *may* appoint, by and with the advice and consent of the Senate, a Deputy Attorney General."[40]

And so, because the acting power from the 1870 law was transferred to the Deputy Attorney General, the language in § 508(a) that states the Deputy Attorney General "may" act as Attorney General in case of vacancy should not be read to indicate an elective option at the discretion of that office. Rather, the codifiers likely intended it to be both a stylistic simplification and to align with § 504, accounting for the possibility that the President did not choose to fill the position and that the power to act would go to the next officer in line.

Put another way, "may act" only depends on whether the office is active; it does not depend on whether a confirmed Deputy Attorney General wants to take the role of Acting Attorney General.[41] Section 508(b) supports this reading by stating that when "neither the Acting Attorney General nor the Deputy Attorney is available . . . the Associate Attorney General shall act as Attorney General." Thus, the section as a whole ensures that there is a Senate-confirmed DOJ senior officer ready to lead the department. Otherwise, without that section, when the "first assistant" position is empty, FVRA might be thought to apply and any other Senate-confirmed officer or senior employee might lead the department over the qualified and confirmed senior agency officers. It seems evident that Congress did not want that. The purpose of § 508 is to vest someone senior, "learned in law," vetted, and confirmed with the automatic authority to act as Attorney General.

The strongest evidence of this mandatory and automatically vested authority comes from President Eisenhower, the provision's original author. When he transmitted the Plan to Congress, he sent an accompanying message that characterized the designated officer as being "*required* to exercise the duties of the Attorney General in case of the absence or disability of the latter, or in case of a vacancy in the office of Attorney General."[42]

Thus, § 508 is a statute that automatically vests power to act in a specific office to pre-determined and specific office holders. It offers no discretion as to whom to appoint or whether the designee may choose not to act or assume those powers. It is automatic and required that the next available designee act as Attorney General and it is not subject to any other statute or discretion, including that of the President.

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[39] *See supra* text accompanying note 28.

[40] 28 U.S.C. § 504 (emphasis added).

[41] The same is historically true for the Associate Attorney General, which was an office added and elevated in 1977 (91 Stat. 1171 (adding 28 U.S.C. § 504a)), and which although authorized internally since 1973 had not always been filled. *See* S. REP. NO. 95-429, at 2–3 (1977) (explaining that the position of Associate AG was created by Department and Executive Order, but was not always filled; but given supervisory demands and a major role in policy as the number three official, the position needed to be legislatively created and made subject to confirmation); see also id. at 3–4 ("Section 2.–Amends section 508(b) of title 28 to specify that the Associate Attorney General is authorized to exercise the duties of the office of Attorney General upon the absence, or disability of the Attorney General or Deputy Attorney General, or in the event of a vacancy in those offices. The section also continues the authority of the Attorney General to designate the further order of succession from among the Solicitor General and the Assistant Attorneys General.").

[42] *See supra* text accompanying note 29.

The third key lesson to take away is the timing of these acts. As will be explained next, the modern antecedent to the current FVRA was passed in 1868. Not two years later, the DOJ Organic Act was passed and provided a different order of succession to act as Attorney General. By 1873, the first attempt at codifying all U.S. laws reconciled the two laws as having now-§ 508, and only that section, control. Accordingly, no concurrent Vacancies Act option was ever thought to exist for the position of Acting Attorney General. And the President never had any discretionary power over that particular office. Congress later ratified the Revised Statutes several times and the provision and its intent and understanding remained the same for at least 125 years.[43]

Next, an examination of the Vacancies Acts will confirm Congress' long-standing intent to have § 508 control succession for the Attorney General's office.

B. History of FVRA and the Vacancies Act: Always Superseded by § 508

As detailed above, DOJ's organic act (now in § 508) expressly covers succession to Acting Attorney General. That power is automatic, it vests at any kind of vacancy, affords no discretion, and it is to be assumed by the Deputy Attorney General and then by Senate-confirmed DOJ officials at the designation of the Attorney General. However, for other appointments, Vacancies Act originally gave the President broad power.

As previously and briefly introduced, Vacancy Acts have existed in some form since 1792. But today's FVRA can be directly traced back to the Vacancies Act of 1868.[44]

However, by 1873, after the first codification project resulting in the Revised Statutes, the Vacancies Act received a telling change. First assistants of a vacant department would still automatically take over, but the provision granting the President the discretion to appoint a different Senate-confirmed officer to head any vacant department was subject to one and only one limitation: a president could not fill a vacant office of Attorney General:

> "Sec. 179. In any of the cases mentioned in the two preceding sections, *except the death, resignation, absence, or sickness of the Attorney General,* the President may, in his direction, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, *by and with the advice and consent of the Senate,* to perform the duties of the vacant office . . . ."

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[43] The long-standing practice and understanding gives great deference in any subsequent issue of statutory construction. *See, e.g., N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2564 (2014) ("And three-quarters of a century of settled practice is long enough to entitle a practice to 'great weight in a proper interpretation' of the constitutional provision." (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))).

[44] *Oversight of the Implementation of the Vacancies Act: Hearing on S. 1764 Before the S. Committee on Governmental Affairs*, 105th Cong., at 1 (1998) (S. Hrg. 105-495) [hereinafter *Hearings*] ("The law was adopted in, essentially, its current form in 1868 . . . ."). The hearings on S. 1764 were repeatedly referenced in the Senate Report and influenced most all of S. 2176, a significant part of which remained verbatim and became FVRA. *E.g.*, S. REP. NO. 105-250, at 9 (1998) (referring to the hearings on March 18, 1998).

Revised Statutes § 179 (1878) (emphases added).[45] Thus, it was without question by codifiers, in their first careful incorporation and study of statutes,[46] that the later-passed and more specific DOJ Organic Act—which contained the version of today's § 508—superseded and served as an exemption to the catch-all provisions of the Vacancies Act.[47]

This understanding stayed the same for decades to come. When this sole explicit exemption, later housed at 5 U.S.C. § 3347, was codified into positive law in 1966, the provision remained substantively unchanged[48]: "This section does not apply to a vacancy in the office of Attorney General."[49]

The same explicit prohibition remained until 1998, when FVRA was clumsily passed. Before moving on to explore the odd history of FVRA, and how the explicit exemption at R.S. § 179 and later § 3347 remained in the original draft version of FVRA, remember this take away: the sole explicit prohibition to the Vacancies Act, which kept a president from appointing anyone else to act as Attorney General, lasted for at least 125 years.[50]

C. FVRA: Context and Comparison from Draft Bill to Enacted Law

What drove Congress to rewrite the Vacancies Act[51] and later pass what would be called FVRA in 1998 had absolutely nothing to do with the position of Attorney General. Nor did it have to do with the order of succession § 508 allowed the Attorney General to choose. But almost ironically, it did have a lot to do with the Department of Justice, albeit only with respect to lower-level offices and responsibilities broadly assigned by the Attorney General through §§ 509 and 510.

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[45] The provision was the same in the 1873 and 1878 Revised Statutes compilations. *E.g.*, Revised Statutes § 179 (1874) (reflecting laws in force in 1873); Revised Statutes § 179 (1878).

[46] For more on Revised Statutes as precursors to the U.S Code, see Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, LIBRARY OF CONGRESS (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/.

[47] *See* 39 Cong. Globe S1163-64 (1868) (statements by Senator Trumbell, the principal sponsor of the Act, indicating the 1868 Vacancies Act was to apply to all vacancies). Recall that not two years later, Congress passed DOJ's organic act and vested sole acting authority in the Solicitor General, which would later be given to the Deputy Attorney General; *see also, e.g.*, *Hearings*, *supra* note 44, at 3 ("[T]he legislative history of 1868 certainly indicated that the Framers seemed to think that the Vacancies Act was the exclusive means by which appointments were made."); 15 Stat. at 168 (the 1868 Vacancies Act § 2, using phrasing to show exclusivity); *see also infra* Appendix C (evolution of acts).

[48] The codification of the title intended no substantive changes in law. *See* House Report on 1966 Codification, *supra* note 2, at 1; *see also supra* text accompanying note 33. According to at least one researcher, the reason Congress limited the Vacancies Act to exclude the specific position of Acting Attorney General was to ensure that a president could not choose someone from outside the department who might skew the positions of the Justice Department during their temporary installation. *Hearings*, *supra* note 44, at 41 (statement of researcher Morton Rosenberg).

[49] 80 Stat. at 426.

[50] *See supra* text accompanying note 43 (case law describing how long-standing practices give great weight in interpreting laws).

[51] Vacancies Act was what the law was called at least after 1866. This article when referencing the contemporary version of the Vacancies Act between 1866 and 1997 uses that term. Otherwise, when referring to general historic versions of the act, it uses "Vacancy Acts."

As the contemporary 1998 report from the Congressional Research Service (CRS) recounts, the main issue that spurred FVRA was the Attorney General's designation of Mr. Bill Lann Lee to the position of Acting Assistant Attorney General for Civil Rights.[52] Mr. Lee was nominated by the President to the position in July 1997, but his nomination was returned in November. The next month, in December, using authority in 28 U.S.C. §§ 509 and 510, the Attorney General appointed Mr. Lee to act in the same position. Afterwards, while Mr. Lee was acting in the position, the President again formally nominated him to the same position. However, the Senate would never confirm him. Mr. Lee ultimately served for nearly three years in the position, based on the time-unlimited authorities in §§ 509 and 510.[53]

This sidestep drew the ire of Congress and Senators Thompson and Byrd in particular. But it was not the only such example of evasion. As the CRS report notes, in 1998 alone, the same year that FVRA was enacted, around 20% of PAS, Senate-confirmed positions were being filled by temporary designees, many of whom exceeded the Vacancies Act 120-day time limit.[54] Some members of Congress, as well as the Comptroller General, believed that such use of "housekeeping statutes" like §§ 509 and 510 constituted an improper avoidance of both the Vacancies Act and of the Constitution's Appointment Clause.[55] But DOJ took the opposite view and continued to use the broad and not-time-limited authority from its Organic Act.[56] DOJ's argument was essentially that the later-enacted and more specific statute controlled, and that because Congress' 1988 Vacancies Act amendments did not change the wording of the key section on exclusivity, its clear intent could not be used to alter the interpretation of unaffected provisions.

Much of the Senate firmly disagreed with DOJ's argument, believing its 1988 Senate Report accompanying amendments to the Vacancies Act evinced an authoritative indication of how to construe the law it amended.[57] Unable to dissuade DOJ, members of the Senate took steps towards a new law to prevent what in their view was the DOJ circumventing the Constitution's

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[52] Morton Rosenberg, CONG. RESEARCH SERV., 98-892, The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative at 1 (1998), https://www.everycrsreport.com/files/19981102_98-892_e35b004e5166781e938da36cf87598c023b03614.pdf; *see also* S. REP. NO. 105-250, at 3 (1998) (part on "Need for Legislation").

[53] *Id.* at 3. Eventually, the President used a recess appointment to more officially appoint Mr. Lee in August 2000. *See* Christopher Marquis, *Clinton Sidesteps Senate to Fill Civil Rights Enforcement Job*, N.Y. TIMES (Aug. 4, 2000), https://www.nytimes.com/2000/08/04/us/clinton-sidesteps-senate-to-fill-civil-rights-enforcement-job.html.

[54] Rosenberg, *supra* note 52.

[55] *Id.*; *see also, e.g.*, 65 Op. Comp. Gen 626, 631–33 (1986), https://www.gao.gov/products/422205 (cited in S. Rep. No. 100-317, 100th Cong. 2d Sess. 14 (1998)).

[56] *E.g.*, 13 Op. O.L.C. 144, 145 (1989); *Hearings*, *supra* note 44, at 25–28 (testimony of Principal Deputy Associate Attorney General Joseph Onek) ("Since 1868, however, Congress has enacted other statutes that, in our view, apply to vacancies of particular departments or agencies. . . . we believe that the Attorney General has ample authority outside the Vacancies Act to provide for the temporary discharge of duties of Department officers when their positions become vacant.").

[57] *E.g.*, S. Res. 128, 105th Cong. (1997), https://www.congress.gov/105/bills/sres128/BILLS-105sres128is.pdf; 143 Cong. Rec. S10, 068 (daily ed. Sept. 26, 1997) (introducing S. Res. 128 and providing statements as to why), https://www.congress.gov/crec/1997/09/26/CREC-1997-09-26-pt1-PgS10068.pdf , 144 Cong. Rec. S6416 (June 16, 1998) (statement of Senator Thurmond explaining the DOJ impetus for cosponsoring the FVRA bill), https://www.congress.gov/crec/1998/06/16/CREC-1998-06-16-pt1-PgS6405-3.pdf.

Appointment Clause.[58] Those efforts began with Senate bill 1764,[59] the first draft of what would later become FVRA.

S. 1764 introduced the basic structure of FVRA, but notably, its draft § 3347 did not have any exemptions and thus would have superseded all previously enacted succession statutes like § 508. During hearings on S. 1764, an associate general counsel of the GAO noted this and offered three suggestions to improve the bill, each of which would be incorporated into the next version of the bill.[60] One of those suggestions resulted in a provision that appeared in Senate bill 2176, and would be enacted by FVRA as § 3347(a)(1)(A): "we would suggest adding an amendment to explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific identified vacancy."[61] The provision now at (1)(B) was not added until later.

Senate bill 2176, incorporated much of S. 1764, as well as many of the recommendations made at the hearings on S. 1764. S.2176 would become the second draft version of what would later be enacted as FVRA.

Like S.1764 before it, S.2176's clear purpose was to put more officials through the Senate's advice-and-consent process, not less. To do so, and to handle the larger load of PAS positions in an expanding federal government, which today has 1242 PAS positions,[62] it expanded the time appointees could act in an office. But of course, the bill also did much more.

For one, the bill expanded the types of vacancies that would qualify under the act to include any reason why the officeholder "is otherwise unable to perform the functions and duties of the office."[63] This new broader term was added specifically in response to a D.C. Circuit ruling that held the prior Vacancies Act only applied to "death, resignation, illness or absence."[64] Accordingly, because this same wording remained in the enacted law, FVRA now applies to any kind of vacancy, included those created by firing or removal.[65]

Another change directly targeted the provisions that allowed Mr. Lee to act in office for so long. The bill aimed to "create a clear and exclusive process"[66] for filling PAS office

[58] *Hearings*, *supra* note 44, at 1–5.

[59] S. 1764, 105th Cong. (as introduced in the Senate on March 16, 1998), https://www.congress.gov/105/bills/s1764/BILLS-105s1764is.pdf.

[60] *Hearings*, *supra* note 44, at 29, 152 (testimony of GAO Associate General Counsel Joan M. Hollenbach).

[61] *Id.* Having found no other indication of why "alternative" was used to describe some retained statutes in an unsupported line in the Senate Report, *infra* note 128, it is likely that GAO's intention was also to retain such statutes by their own terms and have them supersede others, but their use of "alternative means" in this sense to mean other statutes was later misconstrued by the report's author to mean that the other statute can be used as an alternative. Otherwise, the use of "superseding" would have no meaning.

[62] *See* S. Prt. 114-26 (2016) (also known as the "Plum Book"), https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf.

[63] 5 U.S.C. § 3345(a).

[64] *Doolin. v. Office of Thrift Supervision*, 139 F.3d 203, 208 (D.C. Cir. 1998).

[65] *E.g.*, 144 Cong. Rec. at S12,822-23 (daily ed. Oct. 21, 1998) (Statements of Senators Thompson and Byrd, stating it was "meant to cover all situations," it was meant to specifically overrule a D.C. Circuit opinion in *Doolin*, 139 F.3d at 208 (D.C. Cir. 1998), and it would include, among other things, being fired or put in jail).

[66] S. REP. NO. 105-250, at 1 (1998).

vacancies and crafted "catch-all" provisions to ensure that DOJ and others could no longer argue that broad-appointment authorities like §§ 509 and 510 could be used in lieu of the act.[67]

S. 2176, passed the Senate Committee on Governmental Affairs chaired by Senator Fred Thompson on July 15, 1998. It was a well-researched bill and came with a detailed committee report further explaining its provisions.[68] Unfortunately, the bill was not acted upon by the 55-seat Republican Senate majority because it could not override a cloture vote 53 to 38, receiving only one Democratic vote from Senator Byrd.[69]

Instead, negotiations continued and due to significant efforts from Senator Byrd,[70] the draft bill passed in a different form after being inserted into a large omnibus bill: the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999. It became Public Law No. 105-277 (112 Stat. 2681–611) on October 21, 1998 and now sits at 5 U.S.C. § 3345 *et seq*.

D. FVRA Does Not Allow the President to Choose Between It and § 508

1. Differences Between the Draft Bill and the Enacted FVRA

A few points within, and some differences between, the draft bill and the later-passed FVRA are important to understand, especially since they dispel several flawed arguments used to allege that FVRA may be used as an alternative to § 508.

a. Adding A Broader Exemption in § 3347 to Cover More Than Just § 508

To begin, it must be understood that while the sole explicit exemption for § 508 was removed from FVRA's draft bills, and from the Vacancies Act before it—FVRA functioned to retain and grandfather far more succession statutes than just § 508. Accordingly, retaining the sole explicit exemption for § 508 would have not only been redundant, but it could have led to

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[67] *Id.* at 17 ("The bill provides that any statutory provision providing general authority to the head of an executive agency to delegate or reassign duties within that executive agency is not a statutory provision that qualifies within the exception contained in section 3347(a)(2) for existing statutes that provide for the filling of a vacancy in a specific office. This provision forecloses the argument raised by the Justice Department that sections 28 U.S.C. §§ 509 and 510, rather than the Vacancies Act, apply to vacancies in that department."); 144 Cong. Rec. at S12,823 (daily ed. Oct. 21, 1998) ("[I]n an effort to squarely address past problems, the Act specifically prohibits the use of general, 'housekeeping' statutes as a basis for circumventing the Vacancies Act. Provisions such as, but not limited to, 28 U.S.C. 509 and 510, which vest all functions of the Department of Justice in the Attorney General and allow the Attorney General to delegate responsibility for carrying out those functions, shall not be construed as providing an alternative means of filling vacancies.").

[68] *See generally* S. REP. NO. 105-250 (1998).

[69] Rosenberg, *supra* note 52, at 8; 144 Cong. Rec. S11,039 (daily ed. Sept. 28, 1998), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf (debate and vote on cloture).

[70] A memorandum from a staffer of Senator Lieberman's was found in the National Archives and recently made accessible after a 20-year embargo imposed by Senate Resolution 474 in the 96th Congress. The memorandum (on file with the author), dated October 21, 1998 stated, "After extensive negotiations, significant concessions to the Administration and a big personal push by Senator Byrd, the Vacancies Reform Act was included in the Omnibus Appropriations bill." A fax from Senator Byrd's staffer, Peter Kiefhaber, to Senate Governmental Affairs Committee Chief Counsel Fred Ansell on October 16, 1998 showing FVRA's final language also shows Senator Byrd's strong hand in passing FVRA (also on file with author).

confusion and a possibly different and unintended interpretation of its encompassing § 3347(a)(1)(B). Substantial evidence from legislative history supports such a plain-text reading.

The very first version of S. 2176 (as introduced in the Senate on June 16, 1998),[71] did not have what would become § 3347(a)(1)(B). However, it did have what would become (a)(1)(A) as well as the explicit exemption for § 508 in § 3345(c). Comparing the first introduced version of the bill to its final reported version detailed in the Senate Report[72]—as done in this article's Appendix D-2—shows that the automatic designation (1)(B)-type statute was added by an amendment by Senator Lieberman on June 17, 1998. The intent of that provision was described in the Senate Report as follows:

> Senator Lieberman offered an amendment to retain existing statutes that *by their own terms provide* a process for the filling of specific advice and consent positions [(1)(B)-type statutes], as well as the statues [sic] referenced in S. 2176 as introduced, which preserved existing statutes that *allow* the heads of departments to designate an acting official [(1)(A)-type statutes]. That amendment was agreed to by voice vote.[73]

Note the contrasting language used: (1)(A)-type statutes *that allowed* heads of departments to *designate* an acting official were *preserved*; whereas (1)(B)-type statutes *provided a process* for PAS positions *by their own terms* were *retained*. There is a clear dichotomy between keeping a self-executing process for (1)(B) and preserving a permissive and discretionary designation for department heads.

Notes from legislative history, recently made available after the usual 20-year records embargo, show that the (1)(B) amendment was inserted expressly to "grandfather" and keep these existing statutes as controlling. Originating from the Democratic staff on the Senate Governmental Affairs Committee,[74] and urged by Republican Senator Thurmond,[75] the

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[71] S. 2176, 105th Cong. (as introduced in S. Comm. on Governmental Affairs on June 16, 1998), https://www.congress.gov/105/bills/s2176/BILLS-105s2176is.pdf [hereinafter "S. 2176 As Introduced"].

[72] S. 2176, 105th Cong. at page 5 (as amended and then reported by S. Comm. on Governmental Affairs on July 15, 1998), https://www.congress.gov/105/bills/s2176/BILLS-105s2176rs.pdf [hereinafter "S. 2176 As Reported"].

[73] S. REP. NO. 105-250, at 11 (1998) (emphases added).

[74] *E.g.*, DAVID PLOCHER, DEMOCRATIC GAC STAFF, VACANCY ACT TALKING POINTS – JUNE 5, 1998 ("Major Issues – that we should be able to agree on . . . 3. Exclusive Authority: Should the Act override other laws? We should not override other laws already passed by Congress that have temporary appointment procedures. We should "grandfather" existing laws that have specific provisions for filling vacancies and make the Vacancies Act exclusive from now on.") (on file with author; obtained from National Archives); *see also* Message from Debbie Lehrich, Governmental Affairs Committee (GAC) Democratic Staff, to Democratic GAC Staff (June 9, 1998 4:06 p.m.) (on file with author; obtained from National Archives) ("Exclusive Authority: Agreement to have a grandfather provision for existing laws (NOT including DOJ) [refencing §§ 509 and 510] on the books (Byrd wants it that way and Thompson will accede) and prospective exclusivity unless another law specifically mentions the Vacancies Act. Thompson may still want to carve out exceptions from the CRS list in separate legislations after giving authorizing Committees a chance to review—would be done in the future. The CRS list would probably also be included in report language.").

[75] Memorandum from Committee Chief Counsel Fred Ansell to Senator Thompson, re: Vacancies Act (June 4, 1998) (obtained from the National Archives and on file with author) ("On the issue of the prior existing laws that provide for acting officers to serve in ways other than the Vacancies Act, such as U.S. Attorneys,

amendment offered by Senator Lieberman intended to fix what was called a "drafting oversight" and was adopted unanimously in committee.[76]

Circulated with the (1)(B) amendment was an explanatory sheet that was considered by the Committee.[77] It read:

> In addition to the Vacancies Act, which sets executive-branch-wide rules for filling vacancies in positions requiring Senate confirmation, Congress has over the years enacted a number of statutes directing the means for filling vacancies in specific positions. CRS has located approximately 40 such statutes, ranging from one directing the Vice Chairman of the Joint Chiefs of Staff to serve as the Chairman if the latter positions becomes vacant (10 U.S.C. § 154(d)), to one designating succession for the Chief of Naval Operations (10 U.S.C. § 5035(d)(2)), to one allowing the Attorney General to appoint a temporary U.S. Attorney for up to 120 days and for a district court to appoint one thereafter (28 U.S.C. § 546).
>
> The Committee has not heard any evidence suggesting that these provisions have been abused in the past, nor seen any reason to override past Congresses' decisions regarding the filling of vacancies in these particular positions. For that reason, the current draft of the bill "grandfathers" many of these provisions by stating in Section 3347(a)(2) that the bill's limits do not apply if there is already a statute on the books "expressly authoriz[ing] the *President, or the head of an Executive department*, to designate an officer to perform the functions and duties of a specified officer temporarily in an acting capacity" (emphasis added).
>
> By limiting itself to statutes that authorize the President or agency head to designate an acting official, however, this provision inadvertently fails to grandfather a number of the existing statutes that bill presumably does not intend to supplant. First, many of the existing statutes *themselves* designate the officer or employee who serves in the case of a vacancy; such provisions would not be included in a grandfather provision covering only statutes requiring Presidential or agency-head action. Second, the statute governing U.S. Attorney vacancies (referenced above) authorizes district courts to appoint temporary U.S. Attorneys; this too could fall outside of the bill's grandfather protection.

Thurmond has a few issues. His staff was unaware of the special provisions that allow indefinite service by acting Chairmen of the Joint Chiefs as well as Chief of Staff of the Army, Navy, etc., when Thurmond drafter his bill. Thurmond's Armed Services staff would like those provisions to survive any overall Vacancies Act revision. It may be that one of the areas that could be the subject of compromise for actually reaching a deal would preserve the prior statutes that provide for acting officials in specific cases, but that would say that a law that gives the head of the department the ability to delegate and assigned duties to subordinates does not override the Vacancies Act.").

[76] Transcript of Proceedings, U.S. Senate Committee on Governmental Affairs, Business Meeting, at pp. 33–35 (including the amendment and a circulated explanatory sheet entitled "Lieberman Amendment to Federal Vacancies Reform Act of 1998), June 17, 1998 (on file with author as photographed from the National Archives; key excerpts reproduced in Appendix E) [hereinafter "Committee Transcript from June 17, 1998"].

[77] *Id.* (the explanatory sheet that appeared in the Committee Transcript is reproduced in Appendix E-6).

> Senator Lieberman's amendment addresses this problem by making sure that the grandfather provision covers *all* existing statutes specifically providing a means for filling a vacancy.[78]

Senator Lieberman's remarks to the committee were similar to the circulated description:

> Very briefly, in its wisdom, in our wisdom, Congress has over the years exempted a number of positions, as you indicated earlier, from the Vacancies Act by providing a specific way to designate a replacement. The proposal that the Committee has brought forward in the Vacancies Act here makes clear that it is not our intention to override those specific judgments by previous Congresses that have taken different positions out of the Vacancies Act.
>
> For instance, one that comes to mind--and these are normally authorization committees that do this. The Armed Services Committee, in its wisdom, pas passed a statute that says if the Chairman of the Joint Chiefs of Staff vacates the office, the Vice Chairman becomes the Chairman until someone is qualified to replace him.
>
> The proposal before us exempts from the purview of the changes made in it appointments that--statutes in which President or the head of an executive department is expressly authorized to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity.
>
> I believe inadvertently what is omitted here is another way this happens, which is statutes that expressly designate an individual to fill the vacancy as opposed to giving somebody the authority to designate a replacement. And my amendment simply would add that to the so-called grandfather provision of the statute.[79]

Just before the Committee adopted this amendment unanimously, Senator Thompson remarked "I agree. I think that is exactly right."[80] Later, in January 1999, Senator Thompson—who not only chaired the Senate Committee on Governmental Affairs but was also FVRA's principal author—confirmed the plain-text reading on the Senate floor, describing the retained statutes as:

> "providing for the filling of a specific vacant position that the law retains *in lieu of* the procedures contained in the [FVRA]."[81]

Even before that, Senator Thompson characterized the same language from the bill that would remain in FVRA as covering all PAS positions "*except* those that are covered by *express*

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[78] *Id.* (all emphasis and brackets appear in original; no extra emphasis or brackets were added).
[79] *Id.* Senator Lieberman's remarks begin on p. 33, which is on Appendix E-4.
[80] *Id.* (Committee Transcript at p. 35; Appendix E-8).
[81] 145 Cong. Rec. S33 (daily ed. Jan. 6, 1999) (statement of Senator Thompson), https://www.congress.gov/crec/1999/01/06/CREC-1999-01-06-pt1-PgS33-3.pdf (emphasis added). According to Merriam-Webster, "in lieu of" means "in the place of; instead of." *Lieu*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/lieu (last visited Dec. 7, 2018).

specific statute that provide for acting officers to carry out the functions and duties of the office."[82]

Put together with the text of the act, these histories show that—(1) the § 508-specific exception was in the draft bill when no other provision would have exempted it; (2) the bill later added Senator Lieberman's amendment that kept the same § 508 or (1)(B)-type statutes from being overridden by the law; and (3) only after that amendment was added was the specific-to-§ 508 exemption omitted.

Even more critically, these histories also show the independent intent behind FVRA's § 3347(a)(1)(B) and its function to preserve an entire category of § 508-like statutes—not to somehow function as an alternative to them. To use the words of the principal drafters and how they explained the law to the committee, the Senate, and thus to Congress as a whole, FVRA "grandfathered" and "retained" "automatic" and "express specific" statutes that "by their own terms" would control. They would also "overcome" FVRA's appointment procedure and be used "in lieu" of it, not as a parallel-alternative to it.[83] As Senator Lieberman explained to the committee that unanimously approved his amendment: "it is not our intention to override those specific judgments by previous Congresses that have taken different positions out of the Vacancies Act."[84] But by reading FVRA to be used as an alternative to § 508, DOJ's Office of Legal Counsel (OLC) has in effect, and in fact, overridden those retained, specific judgements of previous Congresses to wrongly justify the appointment of Mr. Whitaker.

To be clear, at no point was there any indication in any reviewed legislative history that there was an intent for FVRA to function as a parallel or alternative appointment mechanism to these required statutes, such as for those regarding the Chairman of the Joint Chiefs, U.S. Attorneys, or § 508.[85] In fact, by expressing a clear indication that FVRA not "override those specific judgments by previous Congresses," Senator Lieberman and the Senate committee as a whole foreclosed any intent to have FVRA function as an alternative to such statutes.

b. Removing the Explicit § 508 Exemption Inserted by Codifiers

As just explained, § 3347's primary purpose was to expand the number of statutes explicitly preserved from solely § 508, to larger categories that encompassed § 508 and many more statutes.

Not realizing this, some, including OLC, have argued that the omission of § 508 from the final version of the FVRA bill,[86] and the failure to keep the explicit exemption for § 508 as was

[82] 144 Cong. Rec. S11,022–23 (daily ed. Sept. 28, 1998).
[83] *See supra* notes 74–81.
[84] Committee Transcript from June 17, 1998, *supra* note 79 at p.35 (also available at Appendix E-4).
[85] There is one errant quote from the Senate Report that OLC relies on, it is addressed *infra*, Part II.D.4.
[86] As introduced and as reported, S. 2176 had a provision in § 3345(c) that stated: "(c) With respect to the office of Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable." S. 2176 As Reported, *supra* note 72; S. 2176 As Introduced, *supra* note 71.

in the antecedent Vacancies Act,[87] divines some kind of purposeful intent by Congress not to have § 508 control over FVRA. Such a theory could not be further from the truth.[88] It would be enough to show, as was done above, that § 3347 subsumed and broadened the explicit § 508 exemption, but understanding how the omitted provision came to be in the first place further puts away such an argument.

The language that had for 125-years explicitly exempted § 508 and the office of Attorney General from the Vacancies Act came to be by quirk of history. First, understand that the Vacancies Act of 1868, by its own explicit text, repealed any prior-existing provisions having to do with vacancies.[89] It in effect wiped the slate clean. But then, the very first act that was passed after 1868 and which had its own succession provision happened to be DOJ's Organic Act. That 1870 law was the first to write on the slate just made clean by the Vacancies Act.

Until that time, the statutes at large were compilations; no enacted statute explicitly altered certain text of a prior one, even when a partial repeal was clear. That all changed with the 1873 culmination of the first codification project known as the Revised Statutes.[90] Implemented in 1866, the first ever national law codification project authorized the President to appoint three persons, learned in law, as commissioners, to revise, simplify, arrange, and consolidate all statutes of the United States." Even more specifically, those commissioners were given authority to "bring together all statutes and parts of statutes . . . omitting redundant or obsolete enactments, and making such alterations as may necessary to reconcile the contradictions . . . ."[91]

The codifiers of the Revised Statutes were thus given incredibly broad powers to rewrite prior acts and write into old laws alterations reflecting amendments or partial repeals. It just so happened that in the seven-year period between 1866, when the codification law was passed, and 1873, when the codifiers issued the first Revised Statutes, the two laws at issue here were both enacted. Consequently, it was the first codifiers who wrote into the exiting Vacancies Act the explicit exemption made by the later-passed and more specific DOJ Organic Act. Congress then enacted the Revised Statutes into positive law and erased all prior laws.[92] By doing so, Congress ensured the editorial addition of the § 508 exemption endured as textual law for 125 years.

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[87] The 125-year old provision in the Vacancies Act, which is traceable with slightly different wording all the way back to 1873, stated "This section does not apply to a vacancy in the office of Attorney General." 5 U.S.C. § 3347 (1997). *See also*, *infra* Appendix B.

[88] Besides, construction of a law by omission is expressly disfavored. *E.g.*, *English v. Trump*, 279 F. Supp. 3d 307, 331 (D.D.C. 2018) ("[C]oncluding that the omission of a legislative provision that 'dropped out, without explanation, in the final version' of a bill had no interpretive value." (citing *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990))); *id.* ("[T]he most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61, 67 (1947))).

[89] Act of July 28, 1868, ch. 227, § 4, 15 Stat. 168 (excerpted in Appendix C-2, *infra*).

[90] For an excellent background on this process, see Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, LIBRARY OF CONGRESS (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/; *see also* Will Tress, Lost Laws: What We Can't Find in the U.S. Code, 40 GOLDEN GATE U. L. REV. (2010), https://digitalcommons.law.ggu.edu/ggulrev/vol40/iss2/2.

[91] Act of June 27, 1866, ch. 141, 14 Stat. 74–75.

[92] Act of June 20, 1874, ch. 333, 18 Stat. 113. For another excellent and authoritative history of the Revised Statutes *see* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes--Their History and Use*, 22 MINN. L. REV.

But not long after the 1873 codification, many problems with the process soon became evident.[93] Congress became aware of many statutory modifications and omissions. Consequently, in the next codification project in 1878, Congress removed the authority of the codifiers to alter text, instead instructing them to write notes in margins for any laws that "may in any manner affect or modify any provisions of the Revised Statutes."[94] Also, to guard against any other unintended changes, the second edition of the Revised Statutes[95] were not enacted into law and were only considered prima facie evidence of the law.[96] The same was true for the first edition of the U.S. Code in 1926, whose authorizing law stated the following in a preface: "nothing in this Act shall be construed as repealing or amending any [] law."[97] In other words, no future codifiers after 1873 would have the same authority that allowed substantive and textual changes to be made upon existing laws.

And so, the takeaway is that the DOJ succession provision was the only one that was written into the Vacancies Act because it was the only law passed in the narrow window when codifiers were given such unusually broad editorial powers to alter the text of existing laws.

Critically, later laws were still thought to modify and supersede the Vacancies Act. But in the years following the Revised Statutes those authorities were noted in the margins or amassed in tables—not changed in the actual text of the law as was the case for succession to Attorney General.[98] The Congressional Research Service knew the same when they identified 40-some statutes[99] which were known to supersede the Vacancies Act but which did not have an explicit exemption written into the Vacancies Act.[100] As the Senate Report for S. 2176 stated:

1008, 1012–14 (1938) ("The 1873 revision is the only occasion on which Congress has enacted as law a complete revision of all the federal permanent public statutes."); *see also id.* (explaining the codification process).

[93] Dwan & Feidler, *supra* note 92, at 1014 (describing that 259 errors were later discovered and how Congress was reluctant to enact a law making such codifications the actual law in the future).

[94] Act of Mar. 2, 1877, ch. 82, 19 Stat. 268.

[95]The first Revised Statutes of 1874 (reflecting laws in effect on December 1, 1873; sometimes referred to as the Revised Statutes of 1873 may be accessed online at https://archive.org/details/revisedstatutes01statgoog/page/n45. The Revised Statutes of 1878 may be accessed online at https://www.loc.gov/law/help/statutes-at-large/43rd-congress/c43-revised-statutes.pdf or https://babel.hathitrust.org/cgi/pt?id=uiug.30112046463706;view=1up;seq=110

[96] Wood, *supra* note 90

[97] Act of June 30, 1926, ch. 712., http://cdn.loc.gov/service/ll/uscode/uscode1925-00100/uscode1925-001001001/uscode1925-001001001.pdf. As one commentator put it, "Any inadvertent changes to existing law would not be locked in as enacted law, allowing the court to the determine the authoritative text." Will Tress, *Lost Laws: What We Can't Find in the U.S. Code*, 40 GOLDEN GATE U. L. REV. at 149 (2010), https://digitalcommons.law.ggu.edu/ggulrev/vol40/iss2/2.

[98] *E.g.*, CHIEF JUSTICE WILLIAM RICHARDSON, SUPPLEMENT TO THE REVISED STATUTES OF THE UNITED STATES VOL. 1 1874–1891, at page v (1891), https://www.loc.gov/law/help/statutes-at-large/45th-congress/c45-revised-statutes-supplement.pdf (listing several statutes that would repeal alter or affect R.S. § 177–179, but doing so in a table and by reference to the new law, and not altering the text of the old one).

[99] The term "40-some statutes" refers to the list of statutes itemized in the Senate Report on S.2176. S. Rep. No. 105-250, at 15–16 (1998). The term is used because in fact, numbers 26 and 27 were skipped. *E.g.*, Appendix F.

[100] Records obtained from the National Archives show the 40-some statutes came from fast research done by CRS. *See* Memorandum to David Plocher, Senate Committee on Governmental Affairs, from Rogelio Garcia, Specialist in American National Government, Government Division, Congressional Research Service (CRS), re: Presidential Appointee Positions Requiring Senate Confirmation That May Be Filled Temporarily Under Statutes Other Than the Vacancies Act, May 28, 1998 (on file with author) (reproduced in Appendix F).

> . . . [T]he bill retains existing statutes that are in effect on the date of enactment of the Vacancies Act of 1998 that expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee. (This includes statutes that provide for an automatic designation, unless the President designates another official). The Committee is aware of the existence of statutes specifically governing a vacancy in 41 specific offices, 40 of which would be retained by this bill:
> [. . . .]
> 8. Attorney General (28 U.S.C. § 508(a));
> 9. Attorney General (28 U.S.C. § 508(b));
> [. . . .]

S. Rep. No. 105-250, at 15–16 (1998).[101]

Indeed, the Senate Report, by adopting that list, affirmed the understanding that those statutes superseded the older and more general appointment mechanism of the Vacancies Act. DOJ, Congress, GAO, and even the Senate Committee on Governmental Affairs were all in agreement that these many statutes superseded the "exclusive" Vacancies Act.[102] Of course, that makes sense as a canon of statutory interpretation. A conflict was apparent between the Vacancies Act and other statutes, thus the later-enacted and more specific laws controlled. Never was the Vacancies Act viewed as an alternative to these specific and required statutes.

This practice and firm understanding remained undisturbed by FVRA. In fact, by enacting FVRA and its § 3347, Congress expressly reaffirmed the long-held understanding by broadening the explicit exemption from just § 508 to an entire category of statutes.

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[101] *See infra* Appendix E for a table of the 40-some statutes and their language.

[102] *Hearings*, *supra* note 44, at 26 (testimony of Office of Legal Counsel Special Counsel Daniel Koffsky). ("In 1868, when Congress first passed the Vacancies Act in essentially its present form, it repealed the then-existing statutes on filling vacancies. Since 1868, however, Congress has enacted other statutes that, in our view, apply to vacancies of particular departments or agencies."); *id*. at 28–29 (testimony of GAO Associate General Counsel Joan M. Hollenbach) ("We believe that the application of the Vacancies Act can be superseded only if there is specific statutory language providing another means for filling the particular vacancy in question. We have a number of opinions where we have found such statutory provisions to exist, and when that type of statutory provision does exist, we have concluded that the Vacancies Act does not apply. . . . we would suggest adding an amendment to explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific identified vacancy."); 1 Op. O.L.C. 287 (1977) (Vacancy Act not applicable to the office of Director of OMB in light of the specific statutory authority providing for the filling of the specific position); S. Rep. No. 100-317, at 14 (1988)) ("The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies."); *see* also Committee Transcript from June 17, 1998 *supra* notes 76–79 and accompanying text (statement of Senator Lieberman) ("[I]n our wisdom, Congress has over the years exempted a number of positions, as you indicated earlier, from the Vacancies Act by providing a specific way to designate a replacement.").

Consequently, and critically, the omission of the explicit exemption for § 508—spawned by quirk of history—does not denote any intent by Congress to remove the protection. In fact, because the specific § 508 exemption was removed in the face of the encompassing and broader (1)(B) amendment, it suggests that the entire category of (1)(B) statutes were aimed to be exempted in the same manner as § 508 was. In other words, the omission far better supports this article's conclusion than does it help OLC or proponents of the appointment: the explicit § 508 exemption was removed because its replacement, an encompassing and broader statutory category in (1)(B), was meant to accomplish the same thing as any explicit exemption would. The only reason statutes like § 508 were not specifically listed, is that there were too many of them and the Senate could not be sure it identified them all.

Because of the way FVRA was ultimately passed and inserted into an omnibus House bill, there was no separate report indicating why certain changes were made and why. However, senior Senators Thompson and Byrd, realizing that some guidance ought to be given, went to the Senate floor to explain the changes as a kind of managers' report.[103] In their statements, no mention was made as to why a 125-year-plus understanding and reading of § 508 would have suddenly changed with the omission of the language in draft subsection (c). Nor did they give any indication that the understanding and practice with regard to 40-some other superseding statutes would suddenly change. Histories recounted above show that just the opposite was true: the 40-some statutes were aimed to not be disturbed, and were to continue to be used "in lieu of" FVRA, meaning that at least when those statutes were mandatory, they remained superseding. No other histories reviewed by this author, apart from an unspecific and generalized statement in the Senate Report on a draft bill (to be addressed below), suggests that these automatic designation succession statutes could be supplanted by FVRA as an alternative. Neither does any statutory text so suggest.

All told, the best explanation for the interaction of FVRA and § 508 is the one given by Senator Lieberman and affirmed by a unanimous committee: the superseding provisions continued as "grandfathered" and were not "overridden" by FVRA. Or, to put it as Senator Thompson did in explaining the changes from draft bill to enacted law: "All other changes are intended to be purely technical."[104]

c. Section § 3347's Structure

For more support, look next to just § 3347 and the changes it underwent from final draft bill to enacted FVRA law. The key words from the draft bill that were omitted are presented in ~~strikethrough~~, additions made to the enacted FVRA are in italics, and unstyled normal font indicates no change.

[103] 144 Cong. Rec. at S12,823 (daily ed. Oct. 21, 1998) ("I wish to address the changes that have been made to S. 2176 since it was reported out of the Governmental Affairs Committee. The legislative history of the bill is largely described in the Committee report, S. Rep. 105–250. However, this is the opportunity to discuss the subsequent changes made in the bill."). Because these statements served as a kind of conference or manager's report, they should not be treated as ordinary colloquies or floor speeches. Rather, the statements should hold more weight than even the Senate Report, which only dealt with a previous and subsequently altered version of the bill.

[104] *Id.* at S12,823.

> "Sections 3345 and 3346 ~~are applicable to any office of an Executive agency . . .~~ *are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . .*, unless—
>
> ~~(1) another statutory provision expressly provides that the such [sic] provision supersedes sections 3345 and 3346 [or] . . .~~
>
> ~~(2)~~ *(1)* a statutory provision ~~in effect on the date of enactment of the Federal Vacancies Reform Act of 1998~~ expressly—
>
> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> ~~(3)~~ *(2)* the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

As is apparent, the change that removed the first stricken paragraph ~~(1)~~ concerned only whether FVRA would make all future laws state whether they are intended to comply with or override FVRA.[105] But by having that stricken provision and its "supersedes" language grouped with the two that remained—not to mention the Recess Appointment provision which would objectively supersede FVRA if used—it seems apparent that the subsection was structured to have at least half of its elements, and likely more, supersede FVRA. Such provisions could not reasonably be read to have FVRA function as an alternative to recess appointments and ones with express superseding language.

Other structural clues can be seen as well. In an attempt to ensure the bill was exclusive, the draft bill captured "any office" and then created exemptions for future and past laws. Future laws would have to expressly state that they supersede the bill. But knowing that the same express statement requirement could not be required of past laws, the bill could only describe automatic-designation statutes when looking backwards.[106] After all, it would be strange to allow future laws to supersede FVRA but not allow *any* past laws to do the same—especially in the same "unless" subsection.[107] All of this structure squares with the legislative intent and histories described above. Still, OLC and other proponents either did not examine or flatly disregarded this objective structure to instead zoom in on only one word they suddenly enchanted and empowered: exclusive. But, as will be shown next, that word does not carry with it any different intent than "applicable to any," nor did it change how "exclusive" any Vacancies Act was always thought to be—and it certainly did not conjure the power to override other required laws.

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[105] It should be noted that such a provision would have been suspect on the basis that "one legislature cannot abridge the powers of a succeeding legislature." *E.g.*, *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). A requirement to have Congress insert such a provision in future laws relating to FVRA could have been seen as similarly abridging.

[106] *Accord* PLOCHER, *supra* note 74; Lehrich, *supra* note 74.

[107] For a list of how many long-standing acts and automatic successions statutes would be silently and implicitly overturned by such a reading, see *infra* Appendix E.

d. "Applicable to Any Office" vs. "Exclusive"

Knowing that no text of FVRA says that it could function as an alternative to retained and required statutes, OLC and other proponents of Mr. Whitaker's appointment fall back to a loose textual inference to save their position. They attempt to enchant the word "exclusive" with powers to reach outside of FVRA. Under their reading, "exclusive" allows the statutes FVRA explicitly grandfathered and retained by their own terms to suddenly be avoided and effectively overridden. But their conjuring attempt melts under even the slightest sunlight and scrutiny.

It is true that § 3347 underwent a rewording between its final bill form and enactment, changing "are applicable to any office" to "are the exclusive means." But it is not true that the change was intended to mean anything different. It was simply what Senator Byrd all throughout the legislative process called "a tightening of language" to ensure that DOJ could not still read §§ 509 and 510 to apply.[108] It did not have any effect on § 508 or other (1)(B)-type statutes.

Even before FVRA, all Vacancies Acts were always thought to be the sole or "exclusive" means for filling vacancies —and their text even stated as much. The first modern Vacancies Act in 1868 had a clause that used different wording to say it was exclusive: "no appointment . . . otherwise than as is herein provided . . . shall be made . . . ."[109] The 1874 codified version kept the same.[110] The 1966 codification into positive law also kept nearly the exact same language.[111] Even the 1988 Vacancies Act amendments, according to legislative history, were intended to "make[] clear that the Vacancies Act is the exclusive authority of the temporary appointment."[112]

Recall that the issue over exclusivity was the single largest impetus for FVRA.[113] DOJ and others correctly believed that later-enacted and more specific statutes controlled. [114] But

[108] *E.g.*, *Hearings supra* note 44, at 18 ("Senator Glenn:. Thank you, Mr. Chairman. Under your legislation, as I understand it, we would have to have a- express exemption in another statute in order for any position to fall outside the Vacancies Act, is that correct? Senator Byrd: That is correct. And I hope we will make it so tight, so air-tight, so water-tight that no department can find a crack or a crevice anywhere through which to creep [Laughter]."); *see also* Memorandum from Fred Ansell, Chief Counsel fo the Senate Committee on Governmental Affairs, to Senator Fred Thompson, Committee Chairman, re: Vacancies Act—Managers Amendment (Sept. 24, 1998) (on file with author; obtained through the National Archives) ("The language Byrd wanted to exclusivity of this law is made more authoritative: 'The exclusive means for. . . ."); S. REP. NO. 105-250, at 9 (1998) (same).

[109] Act of July 28, 1868, ch. 227, § 2, 15 Stat. 168 ("And no appointment, designation, or assignment otherwise than as is herein provided, in the cases mentioned in the first, second, and third sections of this act, shall be made except to fill a vacancy happening during the recess of the Senate."); *see also infra* Appendix C (excerpting the evolution of the Vacancy Acts); *see also*, *e.g.*, *Hearings*, *supra* note 44, at 3 ("[T]he legislative history of 1868 certainly indicated that the Framers seemed to think that the Vacancies Act was the exclusive means by which appointments were made.").

[110] R.S. § 181 (1874) ("No temporary appointment, designation . . . shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate.").

[111] 80. Stat. 378, 425–26 (5 U.S.C. § 3349 (1966) (stating an appointment "may not be made otherwise than as provided by [the Act], except to fulfill a vacancy occurring during a recess of the Senate.")).

[112] S. Rep. No. 105-250, at 4 (1998) (quoting the Senate Report addressing the 1988 changes and what would become the Vacancies Act (S. Rep. No. 100-317, 100th Cong. 2d Sess. 14 (1988)); *see also Hearings*, *supra* note 44, at 3 (opening statement of Chairman Thompson) ("So, in 1988, Congress passed an amendment to the Vacancies Act . . . And, again, they stated that the Vacancies Act was supposed to be the exclusive means, unless there were some specific statutes specifically delineated that certain other people could be appointed otherwise.").

[113] *E.g.*, 22 Op. O.L.C. 44, 47 (1998); Rosenberg, *supra* note 52 at 1; S. REP. NO. 105-250, at 17 (1998); *Hearings*, *supra* note 44, at 62–63 (Jan. 14, 1998 memorandum from Morton Rosenburg, CRS, summarizing DOJ's

many in Congress, and also GAO, thought that argument was foreclosed by 1988 amendments to a different part of the Vacancies Act, and a clear legislative history indicating its "exclusivity" and superseding authority over unspecified appointment authorities—or "housekeeping statutes"—like §§ 509 and 510.[115] FVRA was determinatively written in such a way to affirm that position and foreclose DOJ's contrary take,[116] not to affect the (1)(B) statutes it retained.

To accomplish that central goal, FVRA and its § 3347 utilized a legislative technique previously characterized as "catch-and-release." To ensure that FVRA would be considered first in controlling appointments, it would catch every situation by stating it was "applicable to any office" or "exclusive." It would then "release" certain provisions if they satisfied certain criteria that followed "unless—." And as an extra precaution to ensure that no "housekeeping statutes" like §§ 509 and 510 could survive, § 3347(b) foreclosed any errant interpretations by stating: "any statutory provision providing general authority to the head of an Executive agency is not a statutory provision to which subsection (a)(1) applies."[117]

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position as: "[A] congressional waiver of the statutory restrictions on temporary designations. Thus, DOJ argues, where the organic act of a department or agency vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the general restrictions of law on temporarily filling advice and consent positions . . . ."); *see also id.* 116–17; 138–149 (positions of DOJ); 22 Op. O.L.C. 44 (1998), https://www.justice.gov/file/19706/download (OLC's position on the Vacancies Act and its statement before the Senate committee that led to the FVRA); *supra* Part II.B (discussing the history of Vacancy Acts);

[114] *E.g.*, 22 Op. O.L.C. 44, 47 (1998), https://www.justice.gov/file/19706/download (distinguishing between the "housekeeping" or "vesting and delegation statutes" like §§ 509 and 510 and "statutes that name particular positions"; also arguing that the "vesting and delegation" statutes were "enacted after the Vacancies Act [of 1868, which was simply reenacted over time] and supplement it, and § 3349 could not preclude later Congresses from granting this expanded authority."). "Vesting and delegation statutes" are defined as those that "vest[] an agency's powers in the agency head and allow[] delegation to subordinate officials . . . to assign, on an interim basis, the powers of certain vacant Senate-confirmed offices." *Id.* at 44. The term is used interchangeably with "housekeeping" statutes.

[115] *E.g.*, sources cited *supra* note 57.

[116] 144 Cong. Rec. at S12,824 (daily ed. Oct. 21, 1998) (statement of Senator Byrd: "[A] a fair assessment of this entire issue to say that the matter of exclusivity is the bedrock point on which the executive and legislative branches have historically differed. . . . [I]n an effort to squarely address past problems, the Act specifically prohibits the use of general, 'housekeeping' statutes as a basis for circumventing the Vacancies Act. Provisions such as, but not limited to, 28 U.S.C. 509 and 510, which vest all functions of the Department of Justice in the Attorney General and allow the Attorney General to delegate responsibility for carrying out those functions, shall not be construed as providing an alternative means of filling vacancies."); *see also Hearings*, *supra* note 44, at 27 (1998); *id.* at 28-30 ("[W]e [GAO] would suggest adding an amendment to explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific identified vacancy . . . . Although we believe that the Vacancies Act is clear, amendment of the Act to clarify congressional intent could help ensure that the Act is followed . . . .") (GAO's specific testimony is separately accessible online at https://www.gao.gov/assets/110/107309.pdf).

[117] *E.g.*, Morton Rosenberg, CONG. RESEARCH SERV., 98-892, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE at 9 (1998), https://www.everycrsreport.com/files/19981102_98-892_e35b004e5166781e938da36cf87598c023b03614.pdf ("Section 3347(b) expressly negates the DOJ position that the statutory vesting of general agency authority in the head of any agency and allowing the agency head to delegate or reassign those vested duties and responsibilities to other agency officers or employees thereby provides an alternative to the Act's otherwise exclusive means of temporarily filling vacant positions.").

While the provision as passed in FVRA uses the term "exclusive," there is strong evidence that "applicable to any," as was in the final bill version, was intended to mean exactly the same thing. After many hearings and markups, the Senate Committee on Government Affairs believed that the "applicable to any . . . unless" language was sufficiently clear, often characterizing it as "exclusive" in its Senate Report, just as it had been understood with regard to the prior Vacancies Acts.[118] But later realizing that it could arguably be construed as permissive, and to ensure the central point of the legislation, "exclusive" was used in the final act. In the floor speeches that served as kind of managers' report on FVRA, it was characterized as a stylistic change meant only to emphasize and accomplish the same understanding: that it was the "sole means" for appointment.[119] Legislative history also shows there were several discussions all throughout the drafting process to use "exclusive" as a similar, but more iron-clad substitute for "applicable to any." Thus, both "applicable to any" and "exclusive" were meant to accomplish the same kind of "catch-and-release" process, wherein all other appointment acts would first have to clear and be "released" from FVRA.

"Exclusive" had nothing to do with FVRA overtly superseding other statutes. And it was not put in in to somehow read scores of other long-existing statutes with mandatory requirements as suddenly permissive.[120] It and other parts of § 3347 were drafted and then simply stylistically "tightened" to ensure that statutes like §§ 509 and 510 would for the first time be caught by a Vacancy Act, whereas statutes like § 508 would escape. Again, that was the principle purpose of rewriting the Vacancies Act: to capture more situations involving unconfirmed acting officers and make them later undergo Senate confirmation procedures.

To believe that "exclusive" always means that another statute is concurrently available overlooks not only the draft bill's stricken paragraph (1), but also § 3347(a)(2), which falls under the same "unless" exception to exclusivity and concerns presidential recess appointments by the President. No one would reasonably argue that after a recess appointment vested, or after a future statute specifically stated it was superseding, FVRA could still be used to displace those laws. It is thus not different for the rest of § 3347(a). The substitution of "exclusive" in place of "applicable to any" does not change that common sense.

Accordingly, nothing new or different with respect to "alternative" can be divined from the use of the term "exclusive"—let alone some kind of implied authority to displace other required statutes and use FVRA as an alternative that would violate them.

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[118] *E.g.*, S. REP. NO. 105-250, at 1, 8, 12 (1998) (describing the version of the bill that used the "applicable to any office" language and at least three separate times characterizing that bill as being "exclusive").

[119] 144 Cong. Rec. at S12,823 (daily ed. Oct. 21, 1998) ("The phrase 'applicable to" is replaced by "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of in § 3347(a) to ensure that the Vacancies Act provides the sole means by which temporary officers may be appointed unless contrary statutory language as set forth by this legislation creates an explicit exception."); *id.* at S12,824 ("[T]he matter of exclusivity is the bedrock point on which the executive and legislative branches have historically differed. . . . Accordingly, it is my fervent hope that the language of the Act will, once and for all, end this decades-long disagreement."). In addition to the floor statements, both the hearings and the Senate Report are instructive on this point because the two identical releasing "unless" provisions in the bill version remained verbatim in the enacted FVRA.

[120] *Cf.* S. REP. NO. 105-250, at 10 (1998) ("GAO's recommendation [was] that legislation be passed to explicitly provide that the Vacancies Act can be *superseded* only by a statute providing an alternative means for filling a particular vacancy." (emphasis added)).

2. The Two Categories of Statutes Retained by FVRA

Now, again revisit what remained untouched from bill to act in FVRA's § 3347(a): two "release" options, (1)(A) and (1)(B). Their differences were described above, but because they are the key to resolving the statutory question, they warrant another, deeper look—particularly with the benefit of more context and history:

- (1)(A) describes a discretionary appointment. It "authorizes [the President, court, or department head] to designate an officer or employee." It allows appointment of an *unspecified* person to a specific office. In other words, inherent in that discretion is that the President or designee "may" appoint. There is no time limit and no overt restriction on the group of people from which the designee may choose. Time may be taken, and the appointment is not at all required to be made.

- (1)(B), separated by the disjunctive "or," differs significantly. It "designates an officer or employee to perform." Thus, it "vests"[121] automatically. A *specific* officeholder is pre-identified to serve in a specific office. No action is needed. No discretion is afforded. It is not a "may" appoint. It operates like a will in that once the triggering event happens, in this case a vacancy, powers have immediately and automatically transferred. Section 508 fits this category. As President Eisenhower described, § 508 "requires" that the designee "shall act."

Paragraph (1)(B) retains the exact situation that § 508 contemplated, and that for over 125 years was well-understood and even separately codified. As § 508 was mentioned twice in the Senate Report's "retained" list of 40-some statutes, it cannot be reasonably disputed that § 508 does not fall into this (1)(B) category. Even the contemporary CRS report, whose author testified at the hearings on the bill, characterized the (1)(B) exception as occurring when "Congress designates by law a particular officer or employee to temporarily serve."[122]

All that is to show how the two categories differ, and why § 508 falls into the category of statutes that were retained by their own terms.

3. FVRA Cannot Override Other Automatic Authority Statutes

Relatedly, it is important to consider another just-described characteristic of (1)(B)-type statutes: that they are "automatic." Since § 508 is a (1)(B)-type statute and automatically vests and fills an acting office, it raises two separate questions: In such case, does a vacancy, for the

[121] "Vested" was how the source law was used to describe the power given to the Deputy Attorney General. Reorganization Plan No. 4 of 1953, §1(a), 67 Stat. 636 (1953) ("The function with respect to exercising the duties of the office of Attorney General *vested* in the Solicitor General . . . is hereby transferred to the Deputy Attorney General." (emphasis added)).

[122] Rosenburg, *supra* note 52, at 9. The Senate Report also described the differences between these two categories as "authorize . . . designation" and "provide . . . performance." *See* S. REP. NO. 105-250, at 14 (1998) ("Second, the bill retains existing statutes that are in effect on the date of enactment of the Vacancies Act of 1998 that [1] expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that [2] expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee.").

purposes of FVRA then even exist? And what power does FVRA give to displace an official acting under the automatic authority of another act? The answer to the first question is arguable. But the answer to the second seems clearer.

To begin with the first question, ask if FVRA was properly used to fill an office, then could a reasonable argument be made that the office is still vacant for the purposes of using other appointment statutes? It is doubtful that most would make such an argument. It would be properly thought that once an acting appointment is made, that vacancy is settled until a permanent appointment is made through the Senate, or via a recess appointment—both of which are superseding constitutional mechanisms.

Now flip the scenario. When another statute, one which happens to be automatic, immediately fills a vacant office with an acting official, without the need for any additional process, how is it that a vacancy still exists for FVRA to fill? The simplest answer in line with the point of this article is that it does not. And that further points to the automatic statutes as being controlling. More specifically, when § 508 automatically and immediately vests power designated official, and that person immediately acts in the higher office, the office is likely no longer vacant for the purposes of other temporary appointments. Furthermore, to use FVRA to interject in between § 508's congressionally designated longer line of succession could cause further uncertainties and odd results if the FVRA appointee would resign. Would § 508 then not be applicable for the subsequent officer because it was not initially used? And could the office of Attorney General then remain vacant, as FVRA allows when there is no deputy, but § 508 does not? This interjects too much uncertainty, arbitrariness, and conflict into the § 508 statute that by its own terms has none.

Second, and along the same lines, it is even more likely that the automatic power that immediately vests authority cannot be undone by either that statute or FVRA unless expressly stated. Several examples within the list of 40-some statutes show Congress knows well how to provide such authority.[123] Even FVRA itself contains the same kind of a mechanism in § 3345(a)(2) & (3) by stating "notwithstanding paragraph (1)." But therein lies the limitation of FVRA: its discretionary displacement powers are limited to the process in its own § 3345(a)(1). That provision does not grant any authority to override or ignore any other automatically vesting statutes outside of FVRA.[124] Nor does any other provision of FVRA. What authority then does the President use to displace the automatic designee without taking any inherent formal action?

[123] *E.g.*, 38 U.S.C. § 304 (VA Secretary) ("Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary."); 40 U.S.C. 302(b) (GSA Administrator) ("The Deputy Administrator is Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President designates another officer of the Federal Government, when the office of Administrator is vacant."); 42 U.S.C. § 902(b)(4) (Social Security Commissioner) ("The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.").

[124] Congress certainly showed it knew how to override other internal provisions when it used "notwithstanding paragraph (1)" in § 3345. It could have used the same "notwithstanding" paired with an external reference to other statutes if it intended for FVRA to apply externally.

And even if the President does so, would the vacancy not then fall to the next designee in § 508's order of succession?

It ought to be abundantly clear that § 508 and other (1)(B)-type statutes are automatic. The Senate Report, many who testified during the Senate hearings,[125] OLC,[126] and even FVRA's principal author[127] repeatedly described a "shall act" provision as "automatic."

To be forthright, there is ample legislative evidence that suggests (1)(A) statutes were meant to be retained and possibly be controlling by their own terms, like (1)(B) statutes. However, this article does not believe that a plain-text reading allows such a construction—or at least that it would be arguable. A plain-text reading of a statute that is retained and permissive by its own terms necessarily allows the discretion not to use it. And it is a cardinal rule of construction that legislative intent not be used to override a plain-text reading unless it leads to absurd results. Here it does not. It manages to function practically with FVRA, and so this article treats (1)(A)-statutes as controlling first, but allows FVRA to displace their permissive and discretionary authority.

By contrast, returning to this section's focus on the practical effect of automatic statutes, (1)(B)-type statutes clearly differ from (1)(A)-type statutes. Previous sections have highlighted the difference in their text and discretion, *i.e.* whether they are required. This section showed how they might practically function or not function in conjunction with FVRA. All told, this analysis further confirms that "automatic," "specific," and "grandfathered" statutes—like § 508—were not intended to be covered by FVRA at all. They were meant to be "retained" "by their own terms" and used "in lieu of" FVRA—not as alternatives to it. FVRA offers no mechanism to undo, override, or displace their automatically vested authority.

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[125] *E.g.*, S. REP. NO. 105-250, at 13 ("Notwithstanding a first assistant on the day of the vacancy's automatic functioning as the acting officer. . . ."); *Hearings*, *supra* note 44, at 28 ("Vacancies Act creates an automatic procedure by which first assistants may act in vacant positions without the need for standing regulations or individual orders issued under vesting and delegation statutes.").

[126] 25 Op. O.L.C. 177, 178 (2001), https://www.justice.gov/file/19166/download ("[The first] category is triggered automatically once a vacancy is created . . . '*shall* perform'. . ."). 23 Op. O.L.C. 63 (1999), https://www.justice.gov/file/19551/download ("Under the terms of the Vacancies Reform Act, if there is a first assistant to the vacant office, that first assistant begins to serve as the acting officer immediately and automatically upon the occurrence of the vacancy."); 22 Op. O.L.C. 44 (1998), https://www.justice.gov/file/19706/download (describing the pre-1998 Vacancies Act to create "an 'automatic' procedure by which first assistants may act in vacant positions, without the need for standing regulations or individual orders issued under vesting-and-delegation statutes"). *But cf.* 2007 OLC Opinion *infra* note 140, and 2018 OLC Acting AG Memo, *infra* note 163, analyzing FVRA with respect to § 508 and not once using the term "automatic."

[127] 144 Cong. Rec. S11,022–23 (daily ed. Sept. 28, 1998), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf (statement of Senator Thompson) ("The bill will extend the provisions of the Vacancies Act to cover all advice and consent positions. . . *except* those that are covered by express specific statute that provide for acting officers to carry out the functions and duties of the office. Forty-one current statutes now *allow* the President or the head of an executive Department to designate *or provide automatically* for a particular officer to become an acting officer." (emphases added)); *see also* Figure 3 (a highlighted image of the description); *see also id.* at S11,025 (statement of Senator Byrd) (stating that the language in the 1988 committee report, including "The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies," is "what we are attempting to do here [with FVRA] . . . I believe [FVRA] is the vehicle that will accomplish that goal.").

4. Problems with the Errant Senate Report Quote

Apart from focusing on the term "exclusive," the other main point on which OLC and other proponents of Mr. Whitaker's appointment hang their hat is a single unsupported quote from the Senate Report on the draft bill:

> "[E]ven with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office."[128]

Proponents seize on this "alternative procedure" quote and apply it to every instance to aver that either § 508 or FVRA may be used. But in so doing they carelessly and fatally overlook several points.

First, they overlook the illustrative qualifier "may." Just as proponents do not rely on or maybe misunderstand that there is a difference in the two categories of statutes retained by § 3347(a), they similarly do not note that this quote refers to specific positions where persons "may" serve, in other words, permissive or (1)(A)-type statutes.

This distinction matters. It also appears to have been made deliberately. For instance, soon after the term "automatic" is used in the Report to describe one way of assuming acting office,[129] and yet another term describes (1)(B)-type statutes as "expressly" providing for the acting authority of particular officers[130]—this quoted explanation uses different language, "may serve," to suggest that certain statutes authorize, but do not require, someone to fill a vacancy.[131]

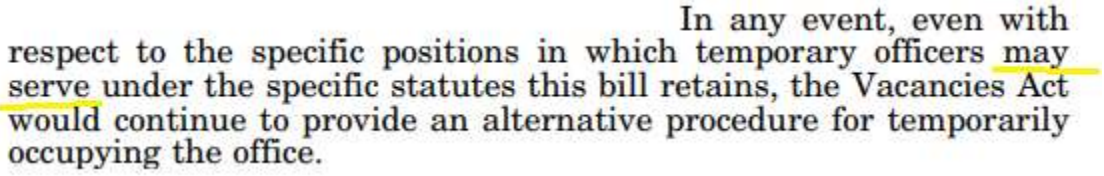
> Second, the bill retains existing statutes that are in effect on the date of enactment of the Vacancies Act of 1998 that expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee. (This includes statutes that provide for an automatic designation, unless the President designates another official).
>
> [Non-relevant parts omitted]

[128] S. REP. NO. 105-250, at 17 (1998).

[129] S. REP. NO. 105-250, at 15 (1998) (highlighting three kinds of statutes that are retained: (1) those that "expressly *authorize* the President . . . *to designate* an officer to perform the functions"; (2) "statutes that *expressly provide* for the temporary performance of . . .an office by a *particular officer* . . .
; and (3) (describing the above two types of statutes as "including" "statutes that provide for an automatic designation, unless the President designates another official.")

[130] *Id.*

[131] *Id.* at 17; *see also, e.g.*, 2 Op. O.L.C. 405, 406 (1978), https://www.justice.gov/file/21581/download ("The statutory language, 'the President may designate any officer,' indicates that the section was intended to confer on the President a discretionary power to be exercised in conformity with the statutory purpose, rather than a binding and exclusive method of appointment . . . .").



In any event, even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office.

Figure 4: A highlighted excerpt of the troublesome quote from the Senate Report on the draft bill.

And so, this article believes that this quote happens to be true, but only for (1)(A)-type statutes. Even in the list of 40-some statutes the Senate Report said would be retained, we can see how some are elective and fit within the "may" or discretionary category. For example, compare some of the listed statutes that fit (1)(A): 28 U.S.C. § 562 ("the Attorney General may designate a person"); 28 U.S.C. § 546 ("the Attorney General may appoint a United States attorney"); 8 U.S.C. § 1324b(c)(1) ("the President may designate the officer or employee who shall act as Special Counsel during such vacancy"); 38 U.S.C. § 304 ("Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs").[132] In none of these examples would the source statute be violated if FVRA would be used instead. But the same option and quote do not hold for (1)(B) or § 508 statutes for any of the reasons articulated in this article.

A second overlooked point is that even if it were intended to apply to both categories of statutes, the legislative intent may only be turned to if the plain-text of the statute supports such a construction.[133] Here, by FVRA's own text, it does not. This was explained in detail above. Furthermore, the construction is made even more impermissible when it is clear that if this quote would be applied to (1)(B)-type statutes, they would not only be construed differently but also violated.

Of course, a comment from a Senate Report, even on an enacted bill, cannot alter the construction of a statute it did not amend. Put another way, as OLC did, "We do not believe however, that a congressional committee can alter the proper construction of a statute through subsequent legislative history."[134]

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[132] For a full analysis of the language in each of the 40-some retained statutes, see Appendix E, *infra*.

[133] Of course, reliance on an unsupported committee report interpretation is usually dismissed, especially where it is unspecific, carries on the same interpretation and practice (*e.g.* all Vacancy Acts were thought to be exclusive), and offered no hint of any change in a significant practice and understanding. *E.g.*, *Pierce v Underwood*, 487 U.S. 552, 556–57 (1988) (Scalia, J.), *cited with approval in* 22 Op. O.L.C. 44, 47–48 n.6 (1998), https://www.justice.gov/file/19706/download), ("If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what [] Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter—because it is not an explanation of any language that the [] Committee drafted, because on its face it accepts the [historical] meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the [] reenactment that Congress thought it was doing anything insofar as the present issue is concerned . . . .").

[134] 13 Op. O.L.C. 144, 146 (1989) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 & n.13 (1980)) (also cited repeatedly in the legislative history of FVRA, including in S. Rep. No. 105-250, at 4 (1998)).

Third, there is nothing to suggest that the regular and 125-year practice of having the automatic succession provision control would be changed. This alternative procedure quote is so heavily relied upon because it is one of the only supportive elements of legislative history. But if were in fact broadly true for all categories of statutes, it would have marked a significant change in practice and understanding. And it would have done so implicitly and without so much as a whisper of intent. Furthermore, it would have done so in the fact of the 1988 law whose history explicitly affirmed that those statutes controlled and the Vacancies Act did not apply.

Fourth, it is highly likely that the errant line from the Senate Report was a misunderstanding by a staffer that mistook a term and did not understand the function or intent behind the provision. The language used in the line, "alternative procedure," likely originated in testimony by GAO at the hearings on a draft bill but was misinterpreted to mean something different than intended. Before any exemptions were inserted in the draft bill, GAO's representative suggested adding a provision that later became § 3347(a)(1)(A):

> "[W]e would suggest adding an amendment to explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific identified vacancy."[135]

Not long after, that provision would appear in the introduced version of S.2176. However, what would become (1)(B) had not yet been added. What GAO was then likely describing was the existing understanding that specific succession statutes superseded the Vacancies Act. In fact, on the same page of her testimony, the GAO representative said as much:

> We believe that the application of the Vacancies Act can be superseded only if there is specific statutory language providing another means for filling the particular vacancy in question. We have a number of opinions where we have found such statutory provisions to exist, and when that type of statutory provision does exist, we have concluded that the Vacancies Act *does not apply*.[136]

Accordingly, the suggestion for what would become (1)(A) objectively appeared aimed to carry on and enshrine that understanding. But when the description was added to the errant line in the Senate Report, "alternative means" was not correctly taken to describe a different process within other statutes, but was rather assumed to mean that the other statutes could be used as an alternative. Of course, that was not the practice or understanding at the time. Moreover, in the same line of GAO testimony, the suggested exemption was described as "superseding," further leaning against any intent to have the saved statutes suddenly become alternatives. When paired with the lack of any discussion to have such statutes provide parallel appointment means, and when taken with the firm evidence to the contrary for (1)(B), it is highly likely that the source of the errant line from the Senate Report was a misunderstanding.

Fifth, even if the quote is correct as to (1)(A), specific legislative history strongly counters against this "alternative-procedure" for (1)(B). Much of this history was described above, characterizing the provision as "grandfathering," "retaining" controlling "by it own

[135] *Hearings supra* note 44, at 28–29 ((testimony of GAO Associate General Counsel Joan M. Hollenbach).
[136] *Hearings supra* note 44, at 28–29 (emphasis added).

terms," etc. But what might be overlooked is that the (1)(A) provision was added by Senator Thompson in the first draft of S.2176, while (1)(B) was added by Senator Lieberman at the urging of the committee's Democratic senators and staff. Thus, the author of the errant line in the Senate Report on Senator Thompson's Republican staff may not have fully understood its effect. Furthermore, the (1)(B) amendment was supported by Senator Thurmond, Chairman of the Senate Committee on Armed Services, who also pushed for the amendment in order not to disturb the automatic succession provisions for key military positions. Of course, if the (1)(B)-category of statutes gives way to FVRA as an alternative, then such statutes are not preserved, they are disturbed—not to mention functionally nullified.

Sixth, the text and structure of § 3347(a) couches against allowing retained statutes to be displaced as alternatives. This too was discussed above. As a brief reminder, neighboring provisions in the same "unless" subsection included ones that would clearly not be available as alternatives: the recess appointments provision and, at the time of the Senate Report, future laws that were similarly retained if they stated they superseded FVRA.

E. Read the Two Statutes in Such a Way to Not Violate Either

As has been emphasized, statutes like § 508 are automatic and required. There is plainly no way to use FVRA and not violate § 508. However, § 508 can vest and not violate FVRA. This reading is not only the intention of Congress and keeps with over 125 years of explicit understanding, but it avoids an unnecessary conflict of laws. Thus, there would then be no reason to go into more complex statutory canons, which might then lead back to the same result as § 508 is a more specific statute and FVRA is more general.[137]

This simple and harmonious reading of FVRA and another statute to avoid a conflict of laws makes practical sense too. Unlike an (1)(B) or § 508 statute that automatically vests power to act in another specified official, in effect immediately filling the vacancy, (1)(A)-type statutes are still open until someone is designated. Thus, a vacancy remains and it is practical to choose either statutory mechanism. But when § 508 automatically vests, the position is filled. And FVRA contains no authority beyond its own provisions to displace other appointments or statutes.

Consequently, the best reading is that § 508 first escapes FVRA and then trumps it. Automatic and specific vesting statutes like § 508 that afford no discretion must be followed and FVRA cannot be used in their stead. This is the best construction of both statutes. It assures constitutionality. It meets the requirement that officials not avoid the Senate, especially since Congress only ceded its confirmation prerogative in specific statutes or has otherwise confirmed the person to a PAS office. It gives deference to prior judgments of Congress. It ensures continuity by someone confirmed by the Senate to be "well-qualified in law." It avoids favoritism. In avoids reading an implicit repeal of over 125 years of practice without any hint of discussion. It works on a practical and procedural sense. It keeps Justice Department policies from being suddenly changed by non-senior and temporary officials. It avoids situations more suspect than the "Saturday Night Massacre." And, most importantly, it follows both laws.

[137] *E.g.*, *Ginsburg, Feldman & Bress v. Fed. Energy Admin.*, 591 F.2d 717, 720 n.5 (D.C. Cir. 1978) ("Where statutes deal with a subject in both general and detailed terms, and there is conflict between the two, the detailed expression prevails.").

Of course, if the specifically designated position is empty, then FVRA could then be applied. It is that kind of a contingency that Presidents have long used to create a line of succession that falls after § 508 and after the order of the Attorney General designating an order from among the Solicitor General and the Assistant Attorneys General. This President has continued that understanding and practice in his own Executive Order,[138] which clearly followed the same non-arbitrary pattern. It was also the same practice this President used to replace Sally Yates as acting head of DOJ with U.S. Attorney Dana Boente.

In sum, this article concludes that past practice is the best indication of the law. Although awkwardly rewritten in FVRA, the law did not change for succession under § 508. Rather, it was expanded to encompass or "catch" all vacancy scenarios and then "release" or exclude two kinds: one discretionary where a President or other designee "may" appoint an unspecified person; and one mandatory and automatically vesting, where a predetermined officer "shall" exercise automatic authority. By the first option, either that source statute or FVRA are available and neither is violated. In the second option, there is no discretion, and having anyone other than the specified officer act in a specified position would violate the "releasing" or "retained" statute. Any other construction would not only result in an unnecessary conflict between laws capable of working with each other, but it would mean that FVRA impliedly repealed a 125-year-old statute and common practice and understandings without mentioning a word.[139] It would also raise unnecessary additional issues, such as whether the automatic vesting statute technically filled any vacancy before the President could use FVRA. The better construction is clear and supported by the act's principal author: § 508 and similar statutes control in case of vacancy. They cannot be avoided, nor can they be disregarded in favor of FVRA without generating a conflict.

F. A Legislative Proposal to Preclude Further Misunderstandings

There is a simple way to avoid any further misconstruction of FVRA. Just like Congress conservatively added a subsection (b) to § 3347 to make absolutely certain that housekeeping statutes would not be retained by FVRA's § 3347 (a)(1), so too could Congress add a subsection (c) to § 3347 to similarly clarify that the retained statutes control by their own terms. An easy way to do so, and to persevere FVRA as a fallback if those sections cannot be applied, is by adding the following to § 3347:

> (c) A statutory provision retained by subsection (a)(1) controls by its own terms and supersedes sections 3345 and 3346. When such retained provisions are inapplicable because the designated offices are vacant, or the designated officer dies, resigns, or is otherwise unable to perform the functions and duties of the office, sections 3345 and 3346 may apply.

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[138] Executive Order 13787 of March 31, 2017 "Providing an Order of Succession Within the Department of Justice," 82 Fed. Reg. 16,723 (Apr. 5, 2017), https://www.govinfo.gov/content/pkg/FR-2017-04-05/pdf/2017-06971.pdf.

[139] *English v. Trump*, 279 F. Supp. 3d 307, 324 (D.D.C. 2018) ("The Court is also guided by the operation of two principles of statutory construction in reaching its conclusion. The first is the harmonious-reading canon. "[I]f by any fair course of reasoning the two [statutes] can be reconciled, both shall stand. . . . The second, related principle is the presumption against implied repeals.").

G. Counterarguments to OLC's Positions

With this article's conclusions set forth—and now with additional support presented by text, context, canons, and history—these conclusions may now be evaluated against the other statutory arguments that have been made to suggest that the FVRA appointment was lawful. Since this exact issue has not been examined by a court, the primary arguments in support of the appointments come from the only part of the government asked to specifically analyze them: DOJ's Office of Legal Counsel (OLC). It was these OLC opinions that ostensibly led at least some of the President's advisors to believe that using FVRA to appoint Mr. Whitaker was lawful. A brief description of and response to some main OLC arguments begins next.

1. OLC's 2007 Opinion

The current President's advisers likely thought that FVRA could be used based on a hasty reading of a September 17, 2007 opinion from DOJ's Office of Legal Counsel (OLC).[140] That OLC opinion advised another president that he could use either § 508 or FVRA to appoint an acting Attorney General even if an officer designated by the Attorney General via § 508(b) held office. The question arose upon the resignation of then-Attorney General Gonzales on September 17, 2007, and OLC quickly issued a short opinion the same day. Those circumstances were, however, somewhat different than the current scenario.

It is significant that, at that time, in September 2007, the offices of Deputy Attorney General and Associate Attorney General were empty, meaning that—unlike the present circumstances—both *congressionally* determined automatic lines of succession under § 508(a) and § 508(b) were inapplicable. However, under remaining authority in § 508(b), an existing Order of the Attorney General already predesignated the subsequent line of succession for senior positions as the Solicitor General, followed by four Senate-confirmed Assistant Attorneys General. The last of the Assistant Attorneys General in the contemporary Order was the Assistant Attorney General for the Civil Division, Peter Keisler. However, he was the President's first choice to lead DOJ. While in point of fact, the first predesignated officer in the Order, Solicitor General Paul Clement, properly took over as Acting Attorney General, he did so for only one day.[141] The next day, ostensibly based on the OLC opinion, Mr. Keisler was appointed by the President to serve as Acting Attorney General until the Senate confirmed Michael Mukasey on November 9, 2007.

The question that OLC thus addressed in 2007 was different and more nuanced than the situation involving Mr. Whitaker where a confirmed Deputy Attorney General held office. The key issue should have properly concerned whether the authority that § 508(b) gave to the

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[140] 31 Op. O.L.C. 208, 209 (2007), https://www.justice.gov/file/451576/download [hereinafter "2007 OLC Opinion"].

[141] Dan Eggen & Elizabeth Williamson, *Democrats May Tie Confirmation to Gonzales Papers*, WASH. POST (Sept. 19, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091801379.html?nav=rss_politics ("Clement . . . wound up officially taking the helm at 12:01 a.m. Monday and relinquishing it 24 hours later, officials said."). It is not known under what authority the President displaced Mr. Clement. Section 508, contained no such authority.

Attorney General to specify an additional order of succession was mandatory or automatically vested, or whether it was permissive so that FVRA could be used in its stead. For that reason, much of the OLC opinion ought to have focused on the language and intent in § 508(b): "the Attorney General may designate . . . in further order of succession, to act as Attorney General."[142] But instead, OLC took a different approach and rested its few and time-constrained arguments on points that can be easily refuted.

First, OLC's opinion properly recognized the "release" provision in FVRA's § 3347(a)(1). It concluded that § 508 falls within that release, thus making FVRA not exclusive. OLC also properly concluded that FVRA "did not extinguish the authority under 28 U.S.C. § 508."[143] However, not realizing the codification error involving the word "may" in § 508(a), OLC categorized the statute as permissive, or what this article calls category (1)(A).

Next, OLC's opinion did something especially strange. To justify that FVRA is available in addition to § 508, OLC said "The Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used."[144] In other words, OLC only considered whether FVRA would be violated by using another law, not whether the other law (§ 508) would be violated by using FVRA.[145] OLC's argument clearly ignored the implications of not following another act. Moreover, by avoiding or not recognizing the apparent conflict

[142] Notably, the same law before 1977 used to state ". . . the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General *may* from time to time prescribe, *shall* act as attorney general." Pub. L. No 89-554, § 4(a), 80 Stat. 612 (1966) (emphases added); *see also infra* Appendices A and B. In reviewing the legislative history from the 1977 law (Pub. L. No. 95-139, 91 Stat. 1171) that added the position of Associate Attorney General, no reasoning for the removal of shall was found. *See* S. REP. NO. 95-429, at 3–4 (1977) (describing only an intent to make the Associate Attorney General position as the "third ranking one," amending § 508(b) to so authorize acting authority, and leaving the remainder of the section to "continue the authority of the Attorney General to designate the further order of succession . . . ."). Thus, it again appears that the sudden insertion of "may" in § 508(b) was a stylistic choice and not a substantive one. But since this was done by Congress and not by unelected codifiers, the law is less certain as to how a court would interpret that change. *Cf. supra* notes 33, 35 (describing no substantive changes intended or judicially inferred in codification statutes).

[143] 31 Op. O.L.C. at 209; *id.* ("The [FVRA] is subject to an exception . . . . § 3347(a)(1)(A). Section 508 of title 28 is such a statute."). Although not affecting their conclusion, it is worthwhile to note that in that analysis OLC miscategorized § 508(a) as being discretionary and falling under § 3347(a)(1)(A) because of the miscodified provision stating the Deputy Attorney General "may exercise" the office. As has been elaborated earlier, that is not the law nor the intent. It was a miscodification of the source law. *See supra* Part II.A; *see also infra* Appendix A.

[144] 31 Op. O.L.C. 208, 209 (2007), https://www.justice.gov/file/451576/download. The quote is taken nearly verbatim from a 2003 OLC opinion considering different circumstances. 27 Op. O.L.C. 121 n.1 (2003), https://www.justice.gov/file/18951/download ("The Vacancies Reform Act does not provide, however, that where there is another statute providing for a presidential designation, the Vacancies Reform Act becomes unavailable.") As will be shortly explained, the 2003 opinion pitted two similar statutes both giving the President, and only the President, "may designate" discretion.

[145] This, in implicit practical effect, imputed a construction on § 508 to suggest it permitted alternative appointments. To use a prior OLC's characterization, to have an isolated statement from a Senate report on the FVRA bill (which was not even passed in the same version), used to interpret a 1953-passed statute would be "an improper and ineffective effort to 'alter the proper construction of a statute through subsequent legislative history.'" S. REP. NO. 105-250, at 4 (1998) (quoting 13 Op. O.L.C. 144, 145 (1989), miscited in the Senate Report as 13 Op. O.L.C. 173, 175 (1989));

caused by the other statute, OLC evaded discussing any canons of statutory construction that apply when two statutes appear to conflict and would have likely hurt their position.[146]

To substantiate its one-way reading, OLC then referenced the Senate Report on the bill with the alternative-procedure quote previously addressed in Part II.D.4. OLC erred for all the reasons already described in that section and its parent part.

OLC also referenced the omission of the explicit exemption for § 508 from the FVRA bill and the prior Vacancies Act.[147] That argument has also previously been addressed and dismissed in Part II.D.1.b and its neighboring sections in Part II.D.

In a further attempt to substantiate that one-way view through FVRA and not through the lens of § 508, OLC pointed to its prior 2003 opinion[148] and attempted to mold it into what it characterized an "analogous circumstance."[149] But that circumstance was very much inapposite. The 2003 opinion dealt with FVRA and another permissive "may" appoint, "(1)(A)" statute, 31 U.S.C. § 502(f), where the President was granted a very similar discretion to the one already in FVRA: "When the Director and Deputy Director are absent or unable to serve or when the offices of Director and Deputy Director are vacant, the President *may designate* an officer of the Office to act as Director."[150]

In other words, 2003 OLC compared two permissive (1)(A)-type statutes that basically said the same thing and even granted both authorities in the same President. Thus, there was no conflict, and so the conclusion to use either law was correct.[151] But of course, that is not the same kind of law the 2007 opinion examined. The 2007 opinion examined whether FVRA allowed either it or an automatically vesting (1)(B)-type statute to be used.[152] The remainder of the 2003

[146] This article does not spend much time addressing the canons that would apply if the statutes did actually conflict. It briefly notes here, however, that FVRA, keeping the same main provisions as the Vacancies Act, and intending to reaffirm its exclusivity, could easily be viewed as minimally amending and renaming the Vacancies Act before it, complicating any later-enacted statute argument.

[147] 31 Op. O.L.C. 207, 209 n.1 (2007).

[148] 27 Op. O.L.C. 121 (2003), https://www.justice.gov/file/18951/download.

[149] 31 Op. O.L.C. at 209.

[150] 31 U.S.C. § 502(f) (emphasis added).

[151] It is notable that the 2003 question addressed by OLC did not have to deal with a (1)(B)-type statute because the officers automatically designated to act happened to be vacant. Had they been occupied, the following statute would have controlled and been analyzed in that context: "The Deputy Director-. . .(2) acts as the Director when the Director is absent or unable to serve or when the office of Director is vacant." 31 U.S.C. § 502(b)(2). But again, OLC did not address that type of statute and only looked at the "may designate" language of subsection (f) and its interplay with the similarly permissive FVRA. *See* 31 U.S.C. § 502(f). Thus, there were no analogous circumstances, only statutes analogous to each other.

[152] See *supra* note 142 for a quick discussion of the how the provision was deceivingly couched with a "may" modifier. Even if the original intent of the source acts for this provision, which used "shall," does not remain, the statute should still have been constructed as an automatically vesting (1)(B)-type statute because the Attorney General had in fact already designated an order, resulting in the same automatically effective vested power. No additional document or paper was needed, the appointments were predetermined and identified specific officeholders to act in a specific office.

opinion focused on constitutional issues and construction of statutes in a way to avoid serious constitutional questions, which incidentally again support this article's conclusions.[153]

Curiously, in another strange twist, the 2007 OLC opinion, recognized, but summarily discredited as incorrect, a guidance issued in 2001 by then-Counsel to the President Alberto Gonzalez. Mr. Gonzales wrote that FVRA does not apply to the position of Attorney General "unless there is no official serving in any of the positions designated by section 508 in case of a vacancy."[154] Mr. Gonzalez, later Attorney General Gonzalez, was and still is correct. His interpretation aligns with the conclusions reached here.

In sum, the 2007 OLC opinion based much of its conclusions on varied "it nowhere says" arguments that only looked at FVRA and ignored the other statute. As a result, the opinion avoided recognizing that its construction created an unnecessary conflict of laws, which it then did not proceed to analyze under any canons of statutory construction. A proper examination of such canons, including the omitted-case canon, the harmonious-reading canon, the general-specific canon, the avoiding-implied-repeal canon, the constitutional-avoidance canon, or the dog-that-didn't-bark canon,[155] would have challenged its conclusion and highlighted several deficiencies in its arguments.[156] Additionally, by improperly conflating easily distinguishable statutes—(1)(A)-type "may" statutes with (1)(B)-type automatic "shall" statute—OLC improperly relied on its prior opinion for support.

2. OLC's 2017 Opinion

Analyzing another recent OLC opinion is also helpful. In November 2017, the director of the Consumer Financial Protection Bureau (CFPB) resigned, and OLC was asked whether the President may designate a replacement using FVRA.[157] The applicable CFPB statute, 12 U.S.C. § 5491(b)(5) stated that the Deputy Director "shall be appointed by the Director" and that he or

[153] From that constitutional discussion one recited maxim may further support this article's conclusion: "The principle of constitutional avoidance requires a construction of the statute that removes serious constitutional doubt: '[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" 27 Op. O.L.C., at 125 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Counci*l, 485 U.S. 568, 575 (1988)). Here, concluding that § 508 and its already Senate-confirmed, same-agency line of succession solely controls avoids a serious constitutional question as to whether an unconfirmed agency employee may serve as a principal officer and department head.

[154] 31 Op. O.L.C. at 210 (quoting Memorandum for the Heads of Federal Executive Departments and Agencies and Units of the Executive Office of the President, from Alberto R. Gonzales, Counsel to the President, Re: Agency Reporting Requirements Under the Vacancies Reform Act at 2 n.2 (Mar. 21, 2001)).

[155] This canon states that a "prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule." CRS RS5153, Valerie C. Brannon, Statutory Interpretation: Theories, Tools, and Trends (2018), at 60 & n.612 https://fas.org/sgp/crs/misc/R45153.pdf. It implicates the prior argument this article raised that no discussion of any kind referenced interpreting § 508 in any different way than had been done for at least 125 years.

[156] For more on canons of construction, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) and CRS RS5153, Valerie C. Brannon, Statutory Interpretation: Theories, Tools, and Trends (2018), https://fas.org/sgp/crs/misc/R45153.pdf (specifically the appendix listing compiled canons at pp. 53–64).

[157] Designating an Acting Director of the Bureau of Consumer Financial Protection, slip op. at 1 (O.L.C. Nov. 25, 2017), https://www.justice.gov/olc/file/1085611/download (hereinafter "2017 OLC Opinion").

she "shall [] serve as acting Director in the absence or unavailability of the Director." In other words, unlike the 2003 or 2007 opinions, it appeared as if the statute at issue was overtly a (1)(B)-type of "released" or "retained" statute.

To its credit, OLC again began with the correct threshold step: identifying that the statute at issue fell within § 3347(a)(1) and thus did not make FVRA exclusive.[158] After spending three pages analyzing whether the particular vacancy circumstance fell within the CFPB statute and concluding that it did, OLC went on to consider whether that CFPB statute eliminated the President's appointment authority in FVRA.

Unsurprisingly, OLC mainly relied on its prior holdings in 2003 and 2007 and their exact same reasonings, failing to note that they dealt with statutes OLC interpreted as permissive. OLC continued to make the same error when it failed to notice that the sole court case it relied on, a Ninth Circuit case styled *Hooks v. Kitsap* similarly only dealt with a permissive "may appoint," (1)(A) statute and even overtly identified it as such.[159]

For the most part, no new arguments were added in OLC's 2017 opinion. Only prior similar arguments were reworded. One such argument "It does not follow, however, that when another statute applies, the Vacancies Reform Act ceases to be available,"[160] again overlooked that while a permissive statute may not be violated, a required or automatic statute would be violated when using FVRA. Another argument rehashed the "alternative-procedure" quote from the Senate Report. After that, OLC expanded upon its old reliance upon the word "exclusive," but expanded its focus on the change in wording from "applicable to any office" to "exclusive" in § 3347(a). This point has also been comprehensively dismissed in Part II.D.1.d., above. OLC thus mostly continued its same old one-way reading and reasoning.

OLC finally added a new argument when it tried to read the CFPB statute's "shall" act provision and FVRA's "shall perform" provision in § 3345(a)(1) as equal. Of particular note, OLC began this part of its analysis by admitting that the CFPB statute used a "mandatory terms."[161] But then, instead of examining the effect of a mandatory statute on § 3347, OLC only noted that § 3345(a)(1), FVRA's default provision for first assistants, "similarly uses mandatory terms." And so, OLC concluded without further analysis that neither was "more mandatory than the other," and that they should consequently be "construed in parallel."[162] Such a construction continued to repeat previous errors already made. The better route would have been to either admit that their construction causes a conflict, or try to find an actual harmonious reading. Instead, OLC deserted the usual interpretive canons and created its "parallel" alternative fiction.

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[158] *Id.* at 1.

[159] *Hooks v. Kitsap Tenant Support Servs., Inc*., 816 F.3d 550, 555 (9th Cir. 2016) (correctly identifying Section 3(d) of the NLRA to state "that the President may temporarily fill a vacancy in the office of the General Counsel" and then excerpting only § 3347(a)(1)(A)). The panel then veered away from the proper analysis, as will be explained below. But the first important step of proper categorization was accomplished. And ultimately the correct conclusion was reached that, in that case, "the President is permitted to elect between these two statutory alternatives to designate an Acting General Counsel." *Id.*

[160] 2017 OLC Opinion, *supra* note 157, at 4.

[161] 2017 OLC Opinion, *supra* note 157, at 7.

[162] 2017 OLC Opinion, *supra* note 157, at 7.

3. OLC's 2018 Memo on the Appointment of Mr. Whitaker

On November 14, 2018, DOJ's Office of Legal Counsel (OLC), released a memorandum specifically addressing, and endorsing, the legality of appointing Mr. Whitaker as the Acting Attorney General.[163] Out of 20 pages of analysis, approximately two-and-a-half pages focused on the statutory interplay of FVRA and § 508. Unfortunately, that section contained few new arguments. OLC mostly played its favorite hits from 2017, 2007, and 2003.[164]

To begin, OLC cited to its 2007 and 2017 opinions to conclude that § 508 "does not displace the President's authority to use the Vacancies Reform Act to depart from the succession order specified under section 508."[165] OLC then repeated its "FVRA nowhere says this can't be done" argument.

Finally, OLC added a twist to another oldie. OLC argued that the "structure" of FVRA made it "clear that office-specific provisions are treated as exceptions for its generally exclusive applicability, not as provisions that supersede the [FVRA] altogether."[166] Identifying § 3349c, which excluded certain independent and multi-member commissions as well as Article I judges, OLC reasoned that if the statutes in § 3347(a)(1) were meant to supersede FVRA, they could have been listed in § 3349c. On a quick glance, it might seem that this legal argument has merit. But upon examination, its persuasiveness is quickly eroded.

As explained above, in Part II.D.1.c, the "structure" of FVRA leans against OLC and suggests that most, if not all, provisions in § 3347(a) were meant to be superseding, as many objectively were or so stated. The legislative history already recounted confirms that intent.

Furthermore, OLC's "structural" argument ignores, among other things, that independent and multi-member commission statutes are themselves structured differently, often having appointments that rotate, or holdover provisions that complicate whether or not a vacancy exists. One position listed in § 3349c is a good example. Commissioners of the Federal Energy Regulatory Commission (FERC) have five members, and while all are appointed by the President, no more than three may be in the same political party.[167] They are also subject to staggered terms and unusual holdover provisions. Allowing FVRA to be used as a different route would potentially allow the President to ignore these key requirements in making appointments. Even more significantly, it would be hard to square this section affecting only multiple

[163] OLC, Memorandum for Emmet T. Flood Counsel to the President Re: Designating an Acting Attorney General, from Assistant Attorney General Steven A. Engel (Nov. 14, 2018), https://www.justice.gov/olc/page/file/1110881/download (hereinafter, "2018 OLC Acting AG Memo").

[164] 2018 OLC Acting AG Memo, *supra* note 163, at 4–6 (in the memo's part I.B).

[165] *Id*. at 3–6.

[166] 2018 OLC Acting AG Memo, *supra* note 163, at 4. This same argument was used in the 2007 opinion, but was given more prominence in the 2018 Opinion.

[167] 42 U.S.C. § 7171(b) ("The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate. . . . Not more than three members of the Commission shall be members of the same political party. Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor is appointed and has been confirmed and taken the oath of Office, except that such Commissioner shall not serve beyond the end of the session of the Congress in which such term expires.").

"members," FERC "commissioners," and Article I judges, into §3347(a)'s (1)(A) or (1)(B) rubric, which covers only "officials."

It is also notable that § 3349c existed in bill form. The Senate Report, which is therefore illustrative, strongly suggests that OLC's argument has no merit. For one, the report said "The Committee believes that [the Vacancies Acts have always not applied to the offices listed in § 3349c] and wishes to avoid any confusion that might result from the enactment of a replacement statute on this point," making it not a separate structural exception, but rather an explicit clarification. As discussed above, the intent behind § 3347(a)(1)(B) similarly aimed to preserve the understanding that those statutes were superseding and as GAO said, meant "that the Vacancies Act does not apply."[168]

Moreover, the Senate Report on neighboring § 3349b shows another example of a structure that did not fit in § 3347, but was meant to be retained and inserted elsewhere:

> Whereas section 3347 retains those statutes that provide a means of succession for an acting person to perform the duties of a specified office, section 3349b retains statutes affecting specific independent establishments headed by a single officer that do not provide for an acting officer, but which instead . . .[169]

It is especially notable that the text of § 3349b states that FVRA "shall not be construed to affect" the kinds of statutes it describes. Put together with the "retained" description of § 3349b, and the likened § 3347 succession statutes—ostensibly referring to (1)(B)-type statutes—it appears from the quote above that at least some "retained" statutes were meant to "not be construed to [be] affect[ed]." This further cuts against OLC's § 3349c-based argument, as well as the overall idea that FVRA could displace § 508.

OLC's next arguments were similarly flawed and again have already been addressed above. OLC pointed to the use of "may" in § 508(a); that was addressed as a miscodification of "shall" in Part II.A and that same subpart above also highlighted the true intent of § 508, as explained by President Eisenhower. OLC then tried to invoke the "first assistant" reference in § 508(a) and the reference to the statutory location of the Vacancy Acts to say that those changes "confirm that section 508 works in conjunction with, and does not displace, the Vacancies Reform Act." This argument was analyzed and dismissed above in Part II.A, noting, among other things, that the same statutory reference was present when the Vacancies Act contained an explicit exemption for § 508, foreclosing any possibly the two ever worked together. Moreover, the likely reason the cross-reference was inserted was as a familiar guidepost to show the new hierarchy of the Deputy Attorney General as second-in-command at DOJ. Nowhere in the text of the law nor in any legislative history was there ever a discussion or intent for the two to work together in the way OLC conjures. Next, OLC repeated its argument of omission regarding the removal of the explicit exemption for § 508.[170] For reference, that was dismissed in Part II.D.1.a

[168] *Hearings supra* note 44, at 28–29; *see also supra* discussion in Part II.D.4 and around note 136.
[169] S. REP. NO. 105-250, at 21 (1998).
[170] 2018 OLC Acting AG Memo, *supra* note 163, at 5 (stating Congress "deliberately chose to make [FVRA] . . . applicable to the office of Attorney General… Yet, when Congress enacted the Vacancies Reform Act

& -.b. Notably, arguments of omission are generally disfavored and unpersuasive.[171] Moreover, it does not address the deafening silence raised by no hint or discussion of an intent to change a 125-year long provision and common understanding affecting at least 40-some statutes across most government agencies and departments. Finally, OLC also pointed to two court cases that will be discussed below as supportive. As will be shown in Part II.H, that is again not the case.

Consequently, the bulk of this 2018 OLC opinion continued to rely on the same flawed premises and inapposite analogies it had made in in past years. Very little was added in the way of new arguments, and when new arguments were raised the history, context, and plain-text reading presented here demonstrates they are not only unpersuasive, but flawed, imputing intent and support from unsubstantiated or disproven assertions. OLC did not consider fundamental canons of construction, a simple harmonious reading,[172] context, common understandings, or other legislative histories. It mainly relied on a conjured interpretation of "exclusive" and an errant quote from the Senate Report to avoid other required and grandfathered statutes. That should not have been enough for such a monumental opinion with substantial consequences. In short, OLC was very wrong.

4. Alternative Reading: Absurd Results

If every court were swindled by the suggestion that FVRA is somehow an alternative to § 508 and similar statutes, it would lead to vast turmoil. Here are just a few consequences of allowing such an unsupported reading.

a. Supervising and Firing Senate-Confirmed Officers

As an initial matter, and as is the case with Mr. Whitaker, an unconfirmed senior employee may now supervise and have vast authority—and even potential removal powers—over officials confirmed by the Senate with the knowledge that they might lead the particular department.

b. Military Madness

Take another example involving authority: military leadership positions. This one is especially apt since orders of succession function like chains of command, ensuring immediate continuity and competence. Among the list of 40-some positions are several military senior commanders, including number 16, the Commandant of the Marine Corps. The applicable statute requires that the position is held by an active-duty Marine Corps officer.[173] It also requires that the Assistant Commandant has the grade of full four-star general, as the Commandant does. But the Assistant Commandant also "shall perform the duties of the Commandant" when there is a

in 1998, it did away with the exclusion for the office of Attorney General"). This of course was a quirk of unusual powers by codifiers, as explained above, and the exclusion was not removed, it was expanded, as explained above.

[171] *See supra* notes 155 (describing the dog-that-didn't-bark presumption, that reasons if a provision had a dramatic effect it would have received at least some comment); *see also supra* note 88 (discussing the omission of legislative provision and several cases that hold "it has no interpretive value"); *Morton v. Mancari*, 417 U.S. 535, 549 (1974) ("repeals by implication are not favored").

[172] *See* cases cited *supra* note 19.

[173] 10 U.S.C. § 5044(a).

vacancy.[174] Under the reasoning of OLC and the alternative approach, Mr. Whitaker could be appointed thereto because FVRA fails to state it cannot be used. Such a result would be ludicrous. It would also run afoul of other laws involving military officer commissions. But under the alternative reading of FVRA, that is exactly the result that would ensue. Could this be what Congress had in mind? Acting Attorney General–General Whitaker, USMC? Of course not.

The same dystopia develops with other positions: The acting Chiefs of Staff of the Air Force (list No. 14)[175] and Army (list No. 15);[176] the Chief of Naval Operations,[177] and even the Chairman of the Joint Chiefs.[178] Under the alternative-approach reading, an appointed parade of horribles could literally march down Pennsylvania Avenue, in uniform and formation no less. [179]

Critically, these were the very worrisome scenarios that spurred the (1)(B) amendment. Documents and transcripts clearly show Senate Armed Services Committee Chairman Thurmond as well as Senator Lieberman and the GAC Democratic staff were especially worried about displacing such statutes, which is why they offered the amendment to preserve and not override them in the first place.[180] In response, Senator Thompson said "I agree. That's exactly right" and the committee unanimously adopted the amendment—intending to keep the entire category encompassing such statutes—including § 508—and to have them control by their own terms.[181] To read FVRA as an alternative to them, or to § 508 would fly in the face of not only text, but this crystal-clear intent.

c. Temporal Flux

Absurdity vests in different forms too. Foundational in the alternative-reading argument is allowing an implicit repeal of an earlier-enacted statute. But what happens when an included automatic-succession statute is not only passed again, but also amended to match key language in FVRA? Number 29 on the list of 40-some bears such an example. The authority for the deputy to act as Secretary of Defense had its applicable provision altered and reenacted in 2014:

[174] *Id.* § 5044(d)(1).
[175] 10 U.S.C. § 8034.
[176] 10 U.S.C. § 3034.
[177] 10 U.S.C. § 5035(d)(2).
[178] 10 U.S.C. § 154.
[179] Not listed in the body of the article is the example of the Chief of the Court of Appeals for Veteran's Claims. Though Article I courts were excluded from FVRA through § 3349c, at the time of the Senate Report, the provision had not yet been added. And so, number 12 on the list was the Chief Judge of that court (CAVC). Since the alternative reading came from and is justified by the Senate Report, it would have to follow—if such a reading were true for all the 40-some statutes—that the President could appoint a chief judge from a clerk or other senior employee of that court who has not even attended law school. Moreover, if that was supposedly true for the CAVC when the Senate Report was issued, perhaps the logic could have also been extended to the Chief Judge of the Court of Federal Claims and the billions of dollars for which that court is responsible. While such an outcome is outrageous, it would hold under the alternative reading—and OLC's opinion.
[180] *See supra* Part II.D.
[181] *See supra* note 80. The Committee on Government Affairs (GAC) did not want to step on other statutes designating succession that would fall under the purview of other Senate committees, calling it comity.

> (b) . . . The Deputy Secretary [of Defense] shall act for, and exercise the powers of, the Secretary when the Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office.[182]

Clearly, this provision was made to comport with the language in FVRA's § 3345(a). But it still remains an automatic designation statute, independent of FVRA. Moreover, it contains no express-statement requirement,[183] Under the basic logic used to read FVRA as an alternative to such statutes, this later-enacted one would similarly, if not even more explicitly, repeal FVRA as an appointment alternative. Would it make sense to destroy a smorgasbord of senior government positions that all have similar "shall act" language, but save only a few[184] that have been reworded after 1998? This too does not digest.

H. Court Cases Have Not Settled that FVRA May Be Used Alongside § 508

As mentioned by OLC options in 2017 and 2018, courts have recently begun to analyze FVRA in the context of other statutes. Two such cases are especially relevant as they offer examples for how future courts might construe and analyze this issue. However, several key differences in those cases are worth highlighting. Supplemented with the context and arguments provided in this article, a strong argument could be made that their holdings would either be inapplicable to the current issue or even supportive, if distinguished properly. At the very least, these cases do not, as some suggest, settle this issue.

1. *Hooks v. Kitsap* (9th Cir. 2016)

As mentioned, the Ninth Circuit recently analyzed FVRA in the context of a separate statute authorizing the appointment of an Acting General Counsel of the National Labor Relations Board (NLRB). [185] The statute at issue was 29 U.S.C. § 153(d), which stated:

> In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy . . . .

Although only a small part of the holding focused on the interplay of the two statutes and whether FVRA was exclusive, it is helpful to review what the court actually said and why.

At the outset of its relevant analysis, the Ninth Circuit correctly observed that FVRA did not exclusively apply because § 153(d) fell under an exception in § 3347(a). Even more

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[182] 10 U.S.C. § 132(b). From the exact notes of the codifiers: "Pub. L. 113–291 substituted 'dies, resigns, or is otherwise unable to perform the functions and duties of the office' for 'is disabled or there is no Secretary of Defense'." Pub. L. 113–291, div. A, title IX, §901(k)(2), 128 Stat. 3468 (Dec. 19, 2014).

[183] *See infra* note 190 (referring to the *English* case where a later-enacted statute was read as an alternative based in large part on such an express-statement-requirement clause).

[184] Number 28 on the list of 40-some, head of the Government Printing Office, had its provisions amended with wording changes enacted in 2014. Pub. L. 113–235, div. H, title I, §1301(c), (e)(1), (i)(1), Dec. 16, 2014, 128 Stat. 2537 , 2538. It too would remain outside of FVRA under the later-enacted reading.

[185] *Hooks v. Kitsap Tenant Support Servs., Inc*., 816 F.3d 550 (9th Cir. 2016).

encouraging, the court went on to specifically categorize it under (1)(A).[186] That was proper. The statute at issue allowed the President discretion to designate an unspecified person to perform the functions and duties of a specific office. But in that way, that provision differed significantly from § 508 at issue here, which again falls under (1)(B) as offering no discretion and automatically designating a specific person act in a specific office.

And so, the *Hooks* holding that either FVRA or § 153(d) may be used does not at all settle the current issue. Improperly distinguished and quickly referenced, *Hooks* may be twisted to say that any retained statute under § 3347(a) may be used to supplement FVRA even if it actually conflicts. However, if properly distinguished, *Hooks* aligns with this article's conclusions that while FVRA may be used alongside or in lieu of "(1)(A)"-type statutes, it may not be used for the more specific and required "(1)(B)"-type statutes, such as § 508.

2. *English v. Trump* (D.D.C. 2018)

At the beginning of 2018, a D.C. district court took on a case called *English*,[187] which had circumstances closer to the ones at issue here. In that case, which happened to be the same one on which OLC opined in 2017, the President used FVRA to appoint an acting director of the Bureau of Consumer Financial Protection (CFPB) in lieu of a provision in the CFPB's 2010 organic act that said its Deputy Director "shall—serve as acting Director in the absence or unavailability of the Director."[188]

The *English* court properly identified that "Dodd–Frank's Deputy Director provision 'designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.'"[189] In other words, the court correctly identified that the provision fell within an exception of § 3347(a)(1). And while it didn't expressly categorize it as a (1)(B)-type statute, it appeared to recognize the difference and at least consider its implications. When looking to *Hooks* for guidance, *English* aptly characterized the difference: "*Hooks* did not squarely address the question before the Court: whether the specific language in Dodd–Frank displaces FVRA. Unlike Dodd–Frank, the NLRA does not require that any particular person 'shall' serve as acting General Counsel, but merely authorizes the President to appoint an acting General Counsel."[190] But after properly distinguishing *Hooks*, the *English* court veered astray.

The turning point began when the court analyzed what it termed an "express-statement requirement,"[191] a provision that stated "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with public or Federal ... officers [or] employees ... shall apply to the exercise of the powers of the [CFPB]."[192] The *English* court took it as a kind of savings clause to say Congress intended to reapply FVRA as if it passed at the same time as the CFPB statute and its "shall" clause. And because Congress did not "expressly provide[] otherwise," FVRA could

[186] *Hooks*, 816 F.3d at 556.
[187] *English v. Trump*, 279 F. Supp. 3d 307, 321 (D.D.C. 2018).
[188] 12 U.S.C. § 5491(b)(5) (passed by Pub. L. No. 111-203, Title X, § 1011, July 21, 2010, 124 Stat. 1964).
[189] *English*, 279 F. Supp. 3d at 320.
[190] *Id.*
[191] *Id.*
[192] *Id.* (quoting 12 U.S.C. § 5491(a)).

be used to appoint the Director.[193] The court later even rejected legislative history of a prior draft showing that drafters considered, but opted not to include, the appointment mechanism through FVRA.[194] It said that such "omission, without any explanation, is insufficient evidence to establish" congressional intent.[195] Further complicating the issue, is that unlike the succeeding officers in § 508, the Deputy who would otherwise lead CFPB was not Senate-confirmed.

As an example of what kind of a provision could, in its reasoning, expressly provide otherwise and displace FVRA, the court cited a Federal Housing Finance Agency statute that said, "the President shall designate [one of three specific officers] to serve as acting director."[196] It thus appears that the court was looking not just for an express provision, but a very specific constraint on the President's appointing powers within FVRA. Even couched against the express-statement requirement, the court was asking for too much of future Congresses, [197] and something that the Congress that passed FVRA never intended.

Skewed by the temporal displacement of the express statement requirement, the *English* court made its largest error by viewing FVRA as electively displacing the CFPB statute.[198] It distinguished *Hooks* dealing with a permissive appointment statute, but nonetheless used its reasoning to infer a "general proposition that where the appointment mechanisms of § 3345 of the FVRA are available but are not, under § 3347, the "exclusive means" of appointing acting officials, they nonetheless typically remain a means of doing so alongside the agency-specific statute."[199] Unfortunately, the *English* court did not conduct a deep dive into the statute and did not have access to the documents, histories, and analyses offered here, and ultimately erred.

Well aware of the canon of harmonious construction and properly citing to those principles,[200] the court simply did not consider that there could be a way for one statute to harmoniously work with the other, without imputing an override. Instead of deferring to the mandatory one, the court stretched the meaning of "exclusive" and found a way for them to, in its words, "co-exist."

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[193] *Id.* at 321; *see also id.* at 322 ("But perhaps most tellingly, the Deputy Director provision—and the entirety of Dodd–Frank—is silent regarding the President's ability to appoint an acting Director. Dodd–Frank certainly does not expressly prohibit the President from doing so. Nor does it affirmatively require the President to appoint a particular person.").

[194] *Id.* at 330 ("[I]n the event of a '[v]acancy or during the absence of the Director' an acting Director 'shall be appointed in the manner provided' by the FVRA." (quoting H.R. 4173, 111th Cong. § 4102(b)(6)(B)(i) (engrossed version, Dec. 11, 2009)).

[195] *Id.* at 331 (citing *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990)).

[196] *Id.* (citing 12 U.S.C. § 4512(f)).

[197] *See supra* note 105 (citing a Supreme Court opinion by Chief Justice Marshall for the proposition that one Congress cannot abridge the powers of a future Congress); *see also Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J, concurring) ("A subsequent Congress, we have said, may exempt itself from such requirements by "fair implication"—that is, without an express statement."); *id.* (also collecting cases supporting Chief Justice Marshall's holding).

[198] *English*, 279 F. Supp. 3d at 319 ("Where such a statutory provision exists [as in § 3347(a)] and § 3345 of the FVRA applies, that can only mean that § 3345—while not the "exclusive means"—is a nonexclusive means for appointing officers." (no supporting citation offered; concluded based on a reading of "exclusive")).

[199] *Id.*

[200] *English v. Trump*, 279 F. Supp. 3d 307, 325 (D.D.C. 2018).

Under the *English* court's construction, the best and most harmonious reading was that the "[CFBP statute] requires that the Deputy Director 'shall' serve as acting Director, but that under the FVRA the President 'may' override that default rule."[201] But that "override" cannot be squared as anything other than an implicit repeal—by an earlier-enacted statute transported into a future one no less.

The better harmonization, even if FVRA was in fact revived, was to first pass through it, just as this article suggests. The court should have looked to FVRA's § 3347(a) first. Then, after properly categorizing the statute at issue to fall under (1)(B), it ought to have viewed the CFPB statute as retained. At that point, you would still have FVRA, which says the President "may appoint," and the CFPB statute that reads "shall." Consequently, using the "shall" statute would be the only way to avoid a conflict. This also would have squared with the legislative history recounted here.

Because much of the opinion rested on transporting FVRA into the time that the CFPB was passed, and because of its unsupported and stretched reading of "exclusive" to override other statutes, *English* should not be thought of as applicable, persuasive, or precedential. Still, it at least offered a proper guide for future courts as to which canons of construction control.

When combined with the harmonious plain-text reading offered here, firmly supported by canons of construction and legislative history, and distinguished from the express-statement mess in *English* and the permissive statute in *Hooks*, a court examining Mr. Whitaker's appointment would be hard-pressed not to find it unlawful and conclude that *FVRA cannot be used to displace § 508 and appoint an acting attorney general*.

III. CONCLUSION

To conclude, it may be helpful to recount and outline the four main categories of appointment statutes and how they are intended to be read with FVRA.

- No Other Applicable Succession Statute: Congress has not spoken on the issue.
  - Result: FVRA controls to fill any PAS vacancy, regardless of cause.

- The "Housekeeping" Category: Broad discretion is given to a designee to appoint an unspecified person to an unspecified PAS position. Also called "vesting and delegation."
  - Result: Statute does not apply; only FVRA applies. *See* 5 U.S.C. § 3347(a), (b).
    - FVRA's § 3346 time limits attach, even if the other statute had no time limits.
    - These types of statutes, sometimes offering unlimited duration for acting appointments were the prime target of FVRA's expanded catch-all provision.
  - Sample Statute: 28 U.S.C. §§ 509–510.

- Category (1)(A): Discretion is given to a designee to choose whether and whom to appoint; A designee "may appoint" an unspecified person to act in a specified PAS position.

[201] *English*, 279 F. Supp. 3d at 325.

- Result: Statute is "released" from the "exclusive" provision of FVRA under § 3347(a)(1)(A). The statute does not conflict, and it or FVRA may be used, so long as the statute does not have a mandatory or automatic element. In other words, there is time for discretion and the office remains vacant before a person is chosen. If FVRA is used, then § 3346's time limits apply. If the other statute is used, then it controls whether or how long a designated person may continue to act in that office.
- Sample Statute: 31 U.S.C. § 502(f).

➢ Category (1)(B): A specified officeholder is to automatically act in a specific position; A predetermined and specified person "shall act" in a specified PAS office.

- Result: Statute is "released" from the "exclusive" "catch" provision of FVRA under § 3347(a)(1)(B). The (1)(B)-type released statute then controls by its own terms, as it has always done, and as that practice was enshrined in FVRA. To hold otherwise would be to create a conflict with the other statute and to divine an implied repeal of over 40-some statutes that were retained. As an additional rationale, FVRA cannot be applied because no vacancy would exist after the automatic succession of the (1)(B)-type statute.
- Sample Statute: 28 U.S.C. § 508.

By now, it should be clear that there is a simple and congressionally intended way to harmonize the two statutes and keep with the long tradition and explicit understanding of § 508: Where a statute is retained, that statute holds the key to whether FVRA may be used in its stead. If it grants permissive "may appoint" discretion, then the statute is not required to be used and the President may opt to use FVRA. But where, as in § 508, the statute automatically vests or otherwise requires a specific official to act in a specific office, there is no option to use FVRA. Doing so would violate the statute and nothing explicit or implicit in FVRA so authorizes.

Legislative histories and context support and affirm this plain-text, harmonious reading. FVRA aimed to preserve the long-held practice and understandings to keep (1)(B)-type statutes as controlling and superseding. Such "express specific statutes" were aimed to be "grandfathered" and "retained." They were to keep their long-held function to control succession "by their own terms." And they were to be used "in lieu of" FVRA, not as a parallel-alternative to it. Use of FVRA as an alternative to those statutes would only function to implicitly repeal them. "It [was] not [Congress'] intention to override those specific judgments by previous Congresses that have taken different positions out of the Vacancies Act."

Accordingly, the President may not use FVRA to appoint anyone he desires to the position of Acting Attorney General. Rather, that office is automatically and immediately filled by § 508, regardless of the President's preferences or his attempted use of FVRA. Furthermore, FVRA cannot be used as an alternative to any other specific and required automatic succession statute.

For the aforementioned reasons, the appointment of Mr. Whitaker to Acting Attorney General is without legal basis. Consequently, if the situation is not rectified, he and the President risk undermining and voiding significant amounts of work of the Department of Justice.

APPENDIX A

HISTORY OF THE ATTORNEY GENERAL SUCCESSION ACT: 1870 TO 1953

Appendix A offers a guided visual depiction showing the evolution of statutory provisions regarding the position and powers of the Solicitor General, the Deputy Attorney General, and the Associate Attorney General.

First, relevant parts of DOJ's organic act are reproduced. Next, those same provisions are shown as they were codified. Finally, the Reorganization Plans of the 1950s, which affected which offices existed and which had the power to serve as Acting Attorney General in case of vacancy are presented.

THE DEPARTMENT OF JUSTICE'S ORGANIC ACT

♦— June 22, 1870: The DOJ Organic Act

June 22, 1870.

CHAP. CL. — *An Act to establish the Department of Justice.*

Department of justice established.
Attorney-General to be the head.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be, and is hereby, established an executive department of the government of the United States, to be called the Department of Justice, of which the Attorney-General shall be the head. His duties, salary, and tenure of office shall remain as now fixed by law, except so far as they may be modified by this act.

Office of solicitor-general established;

SEC. 2. *And be it further enacted*, That there shall be in said Department an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general, and who, in case of a vacancy in the office of Attorney-General, or in his absence or disability, shall have power to exercise all the duties of that office. There shall also be continued in said Department the two other officers, learned in the law, called the assistants of the Attorney-General, whose duty it shall be to assist the Attorney-General and solicitor-general in the performance of their duties, as now required by law.

of assistants of the Attorney-General.
1871, ch. 72. Post, p. 432.

[Non-relevant parts omitted]

Officers hereby transferred to hold office until, &c.
Certain appointments to be made by the President;
others by the Attorney-General.

SEC. 9. *And be it further enacted*, That the several officers hereinbefore transferred from the other Departments to the Department of Justice shall hold their respective offices until their successors are duly qualified; and the solicitor-general, and whenever vacancies occur, the assistants of the Attorney-General, and all the solicitors and assistant solicitors mentioned in this act, shall be appointed by the President, by and with the advice and consent of the Senate. All the other officers, clerks, and employees in the said Department shall be appointed and be removable by the Attorney-General.

[Non-relevant parts omitted]

Attorney-General may require any officer to perform any duty required.
Opinions.
Suits and proceedings.
No fees to any other attorney or counsellor, for any service herein required.

SEC. 14. *And be it further enacted*, That the Attorney-General may require any solicitor or officers of the Department of Justice to perform any duty required of said Department or any officer thereof; and the officers of the law department, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law, necessary to enable the President and heads of the executive Departments, and the heads of bureaus and other officers in such Departments to discharge their respective duties; and shall, for and on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court of the United States and in the court of claims, in which the United States, or any officer thereof, is a party or may be interested. And no fees shall be allowed or paid to any other attorney or counsel[l]or at law for any service herein required of the officers of the Department of Justice.

Source: 16 Stat. 162.

Summaries & Notes

- The Department of Justice is established. It is to be led by the Attorney General (AG).
- The Solicitor General (SG) position is created to assist the AG.
- When the AG's office is vacant, the SG shall be given that power. *(The source of today's § 508.)*
- The SG, Assistants of the AG, and Assistant Solicitors are all Presidentially Appointed Senate-Confirmed (PAS). Other officers are appointed by the AG.
- The AG may require officers to perform duties of any other officer. *(The source of today's § 510.)*

THE PROVISION AS IT APPEARED IN THE REVISED STATUTES AND U.S. CODE

To show the key language remained verbatim, excerpts from the 1874 and 1878 Revised Statutes, the first edition of the U.S. Code in 1925, and a version of the U.S. Code from 1952 are excerpted below.

♦— **Revised Statutes § 347 (1878)**

SEC. 347. There shall be in the Department of Justice an officer learned in the law, to assist the Attorney-General in the performance of his duties, called the Solicitor-General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of seven thousand five hundred dollars a year. In case of a vacancy in the office of Attorney-General, or of his absence or disability, the Solicitor-General shall have power to exercise all the duties of that office.

Solicitor-General.
22 June, 1870, c. 150, s. 2, v. 16, p. 162.

Source: R.S. § 347 (1878).

♦— **5 U.S.C. § 293 (1925)**

293. Solicitor General.—There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance of his duties, called the Solicitor General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of $10,000 a year. In case of a vacancy in the office of Attorney General, or of his absence or disability, the Solicitor General shall have power to exercise all the duties of that office. (R. S. § 347; Mar. 3, 1917, c. 163, § 1, 39 Stat. 1110; Feb. 27, 1925, c. 364, Title II, 43 Stat. 1025.)

Source: 5 U.S.C. § 293 (1925).

♦— **5 U.S.C. § 293 (1952)**

§ 293. Solicitor General.

There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance of his duties, called the Solicitor General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to basic compensation at the rate of $17,500 per annum. In case of a vacancy in the office of Attorney General, or of his absence or disability, the Solicitor General shall have power to exercise all the duties of that office. (R. S. § 347; July 16, 1914, ch. 141, §§ 1, 6, 38 Stat. 497, 509; Mar. 3, 1917, ch. 163, § 1, 39 Stat. 1110; Feb. 27, 1925, ch. 364, title II, 43 Stat. 1025; Oct. 15, 1949, ch. 695, § 3, 63 Stat. 880.)

DERIVATION

Act June 22, 1870, ch. 150, § 2, 16 Stat. 162.

Source: 5 U.S.C. § 293 (1952).

Summaries & Notes

- The power of the SG to act as AG in case of any vacancy remained untouched from 1870 to 1952.

See also Appendix C, excerpting various vacancy acts, which all had broad applicability except for one position: that of Acting Attorney General.

THE REORGANIZATION PLANS OF THE 1950S

On June 20, 1949, Congress passed the Reorganization Act of 1949, Public Law No. 81-109 (63 Stat. 203). It allowed the President to create efficiencies and eliminate redundancies. As one of several aspects of a submitted plan, Congress specifically asked that the President consider "the authorization of any officer to delegate any of his functions." (*Id.* at § 3(5).)

The President would then be required to transmit to each chamber of Congress his plan, which would take effect if no chamber passed a resolution disapproving the plan.

The 1949 plan was one of several such reorganization plans.[202] To be eligible under the 1949 act, a plan would have to be transmitted to Congress before April 1, 1953.

The 1949 act was renewed eight more times, including in 1953, which extended the contemporary end date to April 1, 1955. (67 Stat. 4.)

♦— Reorganization Plan No. 2 (1950)

REORGANIZATION PLAN NO. 2 OF 1950

Prepared by the President and Transmitted to the Senate and the House of Representatives in Congress Assembled, March 13, 1950, Pursuant to the Provisions of the Reorganization Act of 1949, Approved June 20, 1949[1]

DEPARTMENT OF JUSTICE

SECTION 1. *Transfer of functions to the Attorney General.* (a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Attorney General all functions of all other officers of the Department of Justice and all functions of all agencies and employees of such Department.

(b) This section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) in hearing examiners employed by the Department of Justice, nor to the functions of the Federal Prison Industries, Inc., of the board of directors and officers of the Federal Prison Industries, Inc., or of the Board of Parole.

SEC. 2. *Performance of functions of the Attorney General.* The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Justice of any function of the Attorney General, including any function transferred to the Attorney General by the provisions of this reorganization plan.

SEC. 3. *Deputy Attorney General.* The title of "The Assistant to the Attorney General" is hereby changed to "Deputy Attorney General."

SEC. 4. *Assistant Attorney General.* There shall be in the Department of Justice one additional Assistant Attorney General, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall assist the Attorney General in the performance of his duties, and who shall receive compensation at the rate prescribed by law for other Assistant Attorneys General. The office of Assistant Solicitor General, created by section 16 (a) of the Act of June 16, 1933 (48 Stat. 307), is hereby abolished, but the incumbent thereof immediately prior to the taking of effect of the provisions of this reorganization plan shall without reappointment be the first Assistant Attorney General in office under the provisions of this section.

[1] Effective May 24, 1950, under the provisions of section 6 of the act; published pursuant to section 11 of the act (Pub. Law 109, 81st Cong.).

SEC. 5. *Administrative Assistant Attorney General.* There shall be in the Department of Justice an Administrative Assistant Attorney General, who shall be appointed, with the approval of the President, by the Attorney General under the classified civil service, who shall perform such duties as the Attorney General shall prescribe, and who shall receive compensation at the rate of $14,000 per annum.

SEC. 6. *Incidental transfers.* The Attorney General may from time to time effect such transfers within the Department of Justice of any of the records, property, personnel, and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of such Department as he may deem necessary in order to carry out the provisions of this reorganization plan.

[F. R. Doc. 50-4493; Filed, May 24, 1950; 8:45 a. m.]

Source:
15 Fed. Reg. 3173 (1950).

Summaries & Notes

- President Truman submitted Reorganization Plan No. 2 on March 13, 1950.
- The plan re-named the position of "Assistant to the Attorney General" to "Deputy Attorney General." (§ 3.)
- The plan also added a position of "Assistant Attorney General," which was also required to be Senate-confirmed. (§4.)
- The plan also allowed the AG to authorize other officers to perform functions of the AG. (§2.)

[202] *See generally* CRS R42852, Henry B. Hogue, Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress at 22 (2012), https://fas.org/sgp/crs/misc/R42852.pdf.

REORGANIZATION PLAN NO. 4 OF 1953

Section 508 gets its direct roots from Reorganization Plan No. 4 of 1953, which transferred the powers to act as Attorney General from the SG to the newly named position of Deputy AG.

♦— Reorganization Plan No. 4 (1953)

REORGANIZATION PLAN NO. 4 OF 1953

Transmitted Apr. 20, 1953.
Effective June 20, 1953.
67 Stat. 203.
5 USC 133z note.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, April 20, 1953, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949, as amended.

DEPARTMENT OF JUSTICE

SECTION 1. *Acting Attorney General.*—(a) The function with respect to exercising the duties of the office of Attorney General vested in the Solicitor General by Section 347, Revised Statutes, as amended (5 U.S.C. 293), is hereby transferred to the Deputy Attorney General, and for the purposes of Section 177, Revised Statutes (5 U.S.C. 4), the Deputy Attorney General shall be deemed to be the first assistant of the Department of Justice.

(b) During any period of time when, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

SEC. 2. *Assistant Attorney General.*—There shall be in the Department of Justice an additional Assistant Attorney General who shall be appointed by the President, by and with the advice and consent of the Senate, who shall receive compensation at the rate prescribed by law for other Assistant Attorneys General, and who shall assist the Attorney General in the performance of his duties. The office of Assistant Attorney General in charge of customs matters created by section 30 of the act of June 10, 1890, as amended (36 Stat. 108, 5 U.S.C. 296), is hereby abolished.

Source: 67 Stat. 636.

Summaries & Notes

- President Eisenhower submitted Reorganization Plan No. 4 on April 20, 1953.
- The plan transferred the powers of the SG to act as AG to the office of Deputy Attorney General, which was created in May of 1950.
- The plan is the exact source of the law that would later be transferred into positive law in 1966. That same provision, except for some styling changes by codifiers, remains today at § 508. It is substantively unchanged from these 1953 roots.

Reorganization Plan No. 4 of 1953 became law and was inserted into related sections of the U.S. Code by codifiers as notes. Below, are examples of how the U.S. Code appeared in 1958.

§ 293. Solicitor General.

There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance of his duties, called the Solicitor General, who shall be appointed by the President, by and with the advice and consent of the Senate and shall be entitled to the rate of compensation of $20,500 per annum. (R. S. § 347; July 16, 1914, ch. 141, §§ 1, 6, 38 Stat. 497, 509; Mar. 3, 1917, ch. 163, § 1, 39 Stat. 1110; Feb. 27, 1925, ch. 364, title II, 43 Stat. 1025; Oct. 15, 1949, ch. 695, § 3, 63 Stat. 880; Mar. 2, 1955, ch. 9, § 3 (b), 69 Stat. 10.)

DERIVATION

Act June 22, 1870, ch. 150, § 2, 16 Stat. 162.

CODIFICATION

Provisions of section which empowered the Solicitor General to exercise all the duties of the Attorney General in the case of a vacancy in the office of Attorney General, or of his absence or disability, are omitted in view of section 1 of Reorg. Plan No. 4 of 1953, set out as a note under section 291 of this title, which transferred those functions to the Deputy Attorney General.

[Non-relevant parts omitted]

TRANSFER OF FUNCTIONS

The function with respect to exercising the duties of the office of Attorney General vested in the Solicitor General by this section was transferred to the Deputy Attorney General by 1953 Reorganization Plan No. 4, § 1 (a), eff. June 20, 1953, 18 F. R. 3577, set out as a note under section 291 of this title. Section 1 (b) of the Reorg. Plan provided that the order of succession following the Deputy Attorney General be prescribed by the Attorney General.

All functions of all other officers of the Department of Justice and all functions of all agencies and employees of such Department were, with a few exceptions, transferred to the Attorney General, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by 1950 Reorg. Plan No. 2, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3173, 64 Stat. 1261, set out in note under section 291 of this title.

Source: 5 U.S.C. § 293 (1958).

MESSAGE ACCOMPANYING REORGANIZATION PLAN NO. 4 OF 1953

Along with the transmission of the Plan, which would be accepted by Congress as law, Presidents often transmitted messages to Congress to explain their Plan and its rationales. Reorganization Plan No. 4 of 1953 was no different. Because it is helpful to understand why certain language was included, key excerpts from that message are reproduced below.

♦— The President's Message (1953)

REORGANIZATION PLAN NO. 4 OF 1953, PROVIDING FOR REORGANIZATIONS IN THE DEPARTMENT OF JUSTICE

APRIL 20, 1953.—Referred to the Committee on Government Operations, and ordered to be printed

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 4 of 1953, prepared in accordance with the Reorganization Act of 1949, as amended, and providing for reorganizations in the Department of Justice.

Under present law the Solicitor General is required to exercise the duties of the Attorney General in case of the absence or disability of the latter, or in case of a vacancy in the office of Attorney General. This arrangement originated in 1870. The Solicitor General is no longer the appropriate officer of the Department of Justice to be first in the line of succession of officers to be Acting Attorney General. His basic and primary function is to represent the United States before the Supreme Court. He is not concerned with the day-to-day administrative direction of the affairs of the Department of Justice. Thus, he is not likely to be the officer of the Department whose regular duties best prepare him to assume the occasional responsibility of guiding the affairs of the entire Department in the capacity of Acting Attorney General.

The Department of Justice now has a Deputy Attorney General, provision for that title having been made in Reorganization Plan No. 2 of 1950. The duties of this officer include supervision over all major units of the Department of Justice and over United States attorneys and marshals. He is the chief liaison officer of the Department of Justice with the Congress and with other departments and agencies. He is, both by title and by the nature of his functions, the officer best situated to act as the administrative head of the Department of Justice when the Attorney General is absent or disabled or the office of Attorney General is vacant.

Accordingly, the reorganization plan would transfer from the Solicitor General to the Deputy Attorney General the functions conferred by statute upon the former with respect to acting as Attorney General. The reorganization plan makes further provision for Acting Attorney General in circumstances where both the Attorney General and Deputy Attorney General are unavailable. The plan would authorize the Attorney General to prescribe the order of succession in which the Assistant Attorneys General and the Solicitor General shall, in such circumstances, act as Attorney General.

[Non-relevant parts omitted]

that the reorganization plan will promote the best utilization of the top officers of the Department of Justice and the most effective conduct of the affairs of the Department.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *April 20, 1953.*

Source: H.R. Doc. 83-130 (1953)

Summaries & Notes

- President Eisenhower viewed the Solicitor General and consequently later the Deputy Attorney General as "required to exercise the duties of the Attorney General" in case of vacancy.
- The President also viewed the Deputy Attorney General as the proper officer to act as Attorney General by virtue of his role and the Solicitor General's focus on the Supreme Court.

APPENDIX B

THE MODERN ORIGINS OF 28 U.S.C. § 508

In 1966, Congress passed a law making Title 5 of the U.S. Code positive law.[203] In doing so, Congress provided no substantive change in the law and merely merged the provisions of Reorganization Plan No. 4 of 1953—which transferred the power to act as Attorney General from the Solicitor General to the Deputy Attorney General—with the sections of DOJ's Organic Act, and assigned them to a new location in title 28 of the U.S. Code. Below, a chart depicts the laws that were merged to make key sections of the U.S. Code, as they appeared in 1966. For the exact text, reference pages in Appendices A & B, above.

SOURCE OF PROVISION BEFORE 1966	PROVISION AS IT APPEARED IN 1966
Reorganization Plan No. 2 of 1950, § 3, renaming an assitant office to "DAG." ⇨	"§ 504. Deputy Attorney General "The President may appoint, by and with the advice and consent of the Senate, a Deputy Attorney General.
DOJ Organic Act, § 2, regarding the SG's powers as Acting AG in case of vacancy (R.S. § 377 / 5 U.S.C. § 293), & Reorganization Plan No. 4 of 1953, § 1, removing acting AG powers from the SG and transferring them to the DAG. ⇨	"§ 505. Solicitor General "The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties. "§ 508. Vacancies "(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General. "(b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.
DOJ Organic Act, § 14, empowering the AG to require any officer to perform any duty. & Reorganization Plan No. 2 of 1950, § 2, granting the AG authority to select officers to perform any function of the AG. ⇨	"§ 510. Delegation of authority "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

Source: Pub. L. No. 89-554, § 4a, 80 Stat. 378, 611–12 (arranging and codifying Title 5 into positive law) (1966)

In 1977, Congress authorized, but did not require, a president to appoint an Associate Attorney General. 91 Stat. 1171. Consequently, § 508(b) was rewritten to add in the new position to the order of succession. The 1977 change to § 508(b) was the only change to § 508 since it was codified into positive law in 1966.

[203] "Positive law" is a legal term denoting that Congress has passed a law and directed it sit in a specific section of the U.S. Code. In contrast, "non-positive laws" are compilations of statutes where the Office of Law Revision Counsel, the official codifiers, use their best judgment as to how to arrange parts of laws that have been passed without an assignment to a specific section of Code. *See* 1 U.S.C. § 204; Office of Law Revision Counsel, *Positive Law Codification*, U.S. HOUSE OF REPRESENTATIVES, http://uscode.house.gov/codification/legislation.shtml (last visited Nov. 9, 2018).

APPENDIX C

THE EARLY VACANCY ACTS

♦— 1792: The First Vacancy Act

SEC. 8. *And be it further enacted*, That in case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.

Power of the President on death, &c. of the heads of the three departments.

1795, ch. 21.

Source: 1 Stat. 281

Summaries & Notes

• In 1792, the first Vacancy Act allowed the President to authorize "any person" at his discretion to perform the duties of a dead, absent or sick department head or other officer. No time limits attached.

♦— 1795: The Second Vacancy Act

STATUTE II.

CHAP. XXI.—*An Act to amend the act intituled "An act making alterations in the Treasury and War departments."*(a)

Feb. 13, 1795.

Act of May 8, 1792, ch. 37. [Obsolete.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the department of War, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices; it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed, or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.

In case of vacancy in the departments, President to fill them.

Proviso.

APPROVED, February 13, 1795.

(a) See note to act of May 8, 1792, chap. 37.

Source: 1 Stat. 415.

Summaries & Notes

• In 1795, the next Vacancy Act broadened the definition to any vacancy "whereby they cannot perform the duties of their said respective office." It also imposed a six-month term limit for the person appointed to perform such duties.

♦— 1863: Another Vacancy Act

Feb. 20, 1863.

CHAP. XLV. — *An Act temporarily to supply Vacancies in the Executive Departments in Certain Cases.*

Vacancies in Executive Departments, how filled.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of the death, resignation, absence from the seat of Government, or sickness, of the head of any Executive Department of the Government, or of any officer of either of the said Departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize the head of any other Executive Department, or other officer in either of said Departments, whose appointment is vested in the President, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence

For what time.

or inability by sickness shall cease: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

Repealing clause.

SEC. 2. *And be it further enacted*, That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

APPROVED, February 20, 1863.

Source: 12 Stat. 656.

Summaries & Notes

• In 1863, the next Vacancy Act broadened the applicability of the act to any head or officer of executive department.

THE PRECURSORS TO TODAY'S FVRA

♦— 1868: The First Modern Vacancies Act

July 28, 1868. CHAP. CCXXVII. — *An Act to authorize the temporary Supplying of Vacancies in the Executive Departments.*

In case of the death, absence, &c. of head of any executive department, who to perform the duties;

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of the death, resignation, absence, or sickness of the head of any executive department of the government, the first or sole assistant thereof shall, unless otherwise directed by the President of the United States, as is hereinafter provided, perform the duties of such head until a successor be appointed, or such absence or sickness shall cease.

of chief of bureau, &c. except, &c.

SEC. 2. *And be it further enacted*, That in case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, except commissioner of patents, whose appointment is not in the head of any executive department, the deputy of such chief or of such officer, or if there be no deputy, then the chief clerk of such bureau, shall, unless otherwise directed by the President of the United States, as is hereinafter provided, perform the duties of such chief or of such officer until a successor be appointed or such absence or sickness shall cease.

No appointment to be made except to fill a vacancy happening during a recess of the Senate.

And no appointment, designation, or assignment otherwise than as is herein provided, in the cases mentioned in the first, second, and third sections of this act, shall be made except to fill a vacancy happening during the recess of the Senate.

Head of other executive department, &c. may be directed to perform duties;

SEC. 3. *And be it further enacted*, That in any of the cases hereinbefore mentioned it shall be lawful for the President of the United States, in his discretion, to authorize and direct the head of any other executive department or other officer in either of those departments whose appointment is, by and with the advice and consent of the Senate, vested in the President, to perform the duties of the office vacant as aforesaid until a successor be appointed, or the sickness or absence of the incumbent shall cease: *Provided*, That nothing in this act shall authorize the supplying as aforesaid a vacancy for a longer period than ten days when such vacancy shall be occasioned by death or resignation, and the officer so performing the duties of the office temporarily vacant shall not be entitled to extra compensation therefor: *And provided also*, That in case of the death, resignation, absence, or sickness of the commissioner of patents, the duties of said commissioner, until a successor be appointed or such absence or sickness shall cease, shall devolve upon the examiner-in-chief in said office oldest in length of commission.

but for not more than ten days, &c.

Commissioner of patents.

Repeal of inconsistent laws.

SEC. 4. *And be it further enacted*, That all acts heretofore passed on the subject of temporarily supplying vacancies in the executive departments, or which empower the President to authorize any person or persons to perform the duties of the head of any executive department, or of any officer in either of the departments, in case of a vacancy therein or inability of such head of a department or officer to discharge the duties of his office, and all laws inconsistent with the provisions of this act, be, and the same are hereby, repealed.

APPROVED, July 23, 1868.

Source: 15 Stat. 168.

Summaries & Notes

- In 1868, a different version of a Vacancy Act was passed. It would lay the foundation for similar acts for over a century.
- The first major change was to again limit the applicable "vacancy" to that of "death, resignation, absence, or sickness."
- Another major change was to segment the kinds of vacancies.
  - --Section 1 was for department heads and it allowed the first or sole assistants to assume the office, unless otherwise directed by the President as § 3 allowed.
  - -- Section 2 was for the chief of a bureau or any officer thereof and it allowed a deputy of either to perform duties, unless otherwise directed by the President via § 3.
- Section 2 also effectively stated that the act was the sole and exclusive means for appointments.
- Section 3 allowed the President discretion to choose a replacement, but limited that choice to a Senate-confirmed officer. A time limit of 10 days also applied.
- Section 4 repealed all prior inconsistent laws.

THE PRECURSORS TO TODAY'S FVRA, CONTINUED

♦— 1873: A Specific Exemption for the Acting AG

Vacancies; how temporarily filled. 23 July, 1868, c. 227, s. 1, v. 15, p. 168.

SEC. 177. In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease.

Vacancies in subordinate offices. 23 July, 1868, c. 227, s. 2, v. 15, p. 168.

SEC. 178. In case of the death, resignation, absence, or sickness of the chief of any Bureau, or of any officer thereof, whose appointment is not vested in the head of the Department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease.

Discretionary authority of the President. 23 July, 1868, c. 227, s. 3, v. 15, p. 168.

SEC. 179. In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease. 22 June, 1870, c. 150, s. 2, v. 16, p. 162.

Temporary appointments limited to ten days.

SEC. 180. A vacancy occasioned by death or resignation must not be temporarily filled under the three preceeding sections for a longer period than ten days. 23 July, 1868, c. 227, s. 3, v. 15, p. 168.

Restriction on temporary appointments. 23 July, 1868, c. 227, s. 2, v. 15, p. 168.

SEC. 181. No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections one hundred and seventy-seven and one hundred and seventy-eight, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate.

Extra compensation disallowed. 23 July, 1868, c. 227, s. 3, v. 15, p. 168.

SEC. 182. An officer performing the duties of another office, during a vacancy, as authorized by sections one hundred and seventy-seven, one hundred and seventy-eight, and one hundred and seventy-nine, is not by reason thereof entitled to any other compensation than that attached to his proper office.

Source: Revised Statutes §§ 177–182 (1874) (stating laws in 1873); Revised Statutes §§ 177–182 (2d. 1878) (shown here).

Summaries & Notes

- At least as early as 1873, but after the DOJ Organic Act of 1870, a specific exemption was included in the Revised Statutes to preclude applying the Vacancies Act to the position of Acting AG. It was the only such exception listed. And it would last for 120 years, until 1998.
- "Sec. 179. In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion authorize [a Senate-confirmed officer] . . . to perform the duties of the vacant office."
- Section 181 contained the exclusivity clause.

♦— 1891: Adjusting Time Limits

February 6, 1891.

CHAP. 113.—An act to amend section one hundred and eighty of the Revised Statutes of the United States.

Temporary appointments to fill vacancies by death, etc., of heads of Departments. R. S., Sec. 180, p. 29, amended. Limit increased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one hundred and eighty of the Revised Statutes of the United States, be, and the same is hereby, amended so as to read as follows:

A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than thirty days.

Approved, February 6, 1891.

Source: 26 Stat. 733.

Summaries & Notes

- In 1891, the time limit was increased from 10 to 30 days. The specific AG exemption remained.

THE 1966 CODIFICATION OF THE VACANCIES ACT

♦— 1966: Codification into Positive Law

§ 3345. Details; to office of head of Executive or military department

When the head of an Executive department or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

§ 3346. Details; to subordinate offices

When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

§ 3347. Details; Presidential authority

Instead of a detail under section 3345 or 3346 of this title, the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. This section does not apply to a vacancy in the office of Attorney General.

§ 3348. Details; limited in time

A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 30 days.

§ 3349. Details; to fill vacancies; restrictions

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate.

Source: 80 Stat. 378, 425–26

Summaries & Notes

- In 1966, Congress codified Title 5 into positive law, rearranging and making small and insubstantial wording edits to existing provisions of the Vacancies Act. Sections § 3345 and on would serve as the permanent location of that and future Vacancy Acts.

- No substantive changes were made. And apart from stylistic wording choices, the same provisions from 1878, with the timing changes of 1891, remained.

- Section 3347 retained the long-standing exemption: "This section does not apply to a vacancy in the office of Attorney General."

- Section 3349 codified the exclusivity clause, stating that a temporary appointment may not be made other than through the Vacancies Act.

♦— 1988: Time Limit Adjustments

"§ 3348. Details; limited in time

"(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that—

"(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title—

"(A) until the Senate confirms the nomination; or

"(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

"(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

"(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.".

Source: 102 Stat. 985, 988; (H.R. 3932) (H. Rep. 100-532)

Summaries & Notes

- In 1988, the time limit in § 3348 was increased from 30 to 120 days, with two potential additional 120-day periods after submission of a nominee to the Senate for confirmation.

APPENDIX D

KEY SECTION COMPARISON: DRAFT REPORTED FVRA BILL VS. ENACTED FVRA LAW

Deletions from S. 2176 are in ~~strikethrough~~. Additions in the enacted FVRA are {*italicized*}.

§ 3345. Acting officer

(a) If an officer of an Executive agency [. . .] whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant {*to the office*} of such officer shall perform the functions and duties of the office temporarily in an acting capacity~~,~~ subject to the time limitations of section 3346; ~~or~~
(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the *vacant* office temporarily in an acting capacity, subject to the time limitations of section 3346.~~{~~*; or*}
{*(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if-*}
{*(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and*
(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.}
[. . . .]

~~(c) With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.~~
[Replaced with an unrelated provision having to do with reappointment to an additional term and timing.]

[. . . .]

§ 3347. ~~Application.~~ {*Exclusivity*}

(a) Sections 3345 and 3346 ~~are applicable to~~ {*are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of* } any office of an Executive agency [. . .] for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

~~(1) another statutory provision expressly provides that the such provision supersedes sections 3345 and 3346;~~
(~~2~~{*1*}) a statutory provision ~~in effect on the date of enactment of the Federal Vacancies Reform Act of 1998~~ expressly—
(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
[. . . .]

KEY SECTION COMPARISON: DRAFT INTRODUCED FVRA BILL VS. DRAFT REPORTED FVRA BILL

Deletions to S. 2176 as introduced are in ~~strikethrough~~.
Additions to S. 2176 as reported are {*italicized*}.

§ 3347. Application

(a) Sections 3345 and 3346 are applicable to any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

(1) another statutory provision expressly provides that such provision supersedes sections 3345 and 3346;

(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly {—}

{*(A)*} authorizes the President, {*a court,*} or the head of an Executive department, to designate an officer {*or employee*} to perform the functions and duties of a specified office temporarily in an acting capacity; or

{*(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or*}

(3) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(2) applies

APPENDIX E

RELEVANT, NEW EXCERPTS FROM THE LEGISLATIVE HISTORY OF FVRA

Much of what is presented is new has not heretofore been seen or made publicly available. Senate Resolution 474 of the 96th Congress imposed a 20-year moratorium on releasing records.[204] As FVRA was passed in October 1998, only recently, in October 2018, has the full range of histories been made available.

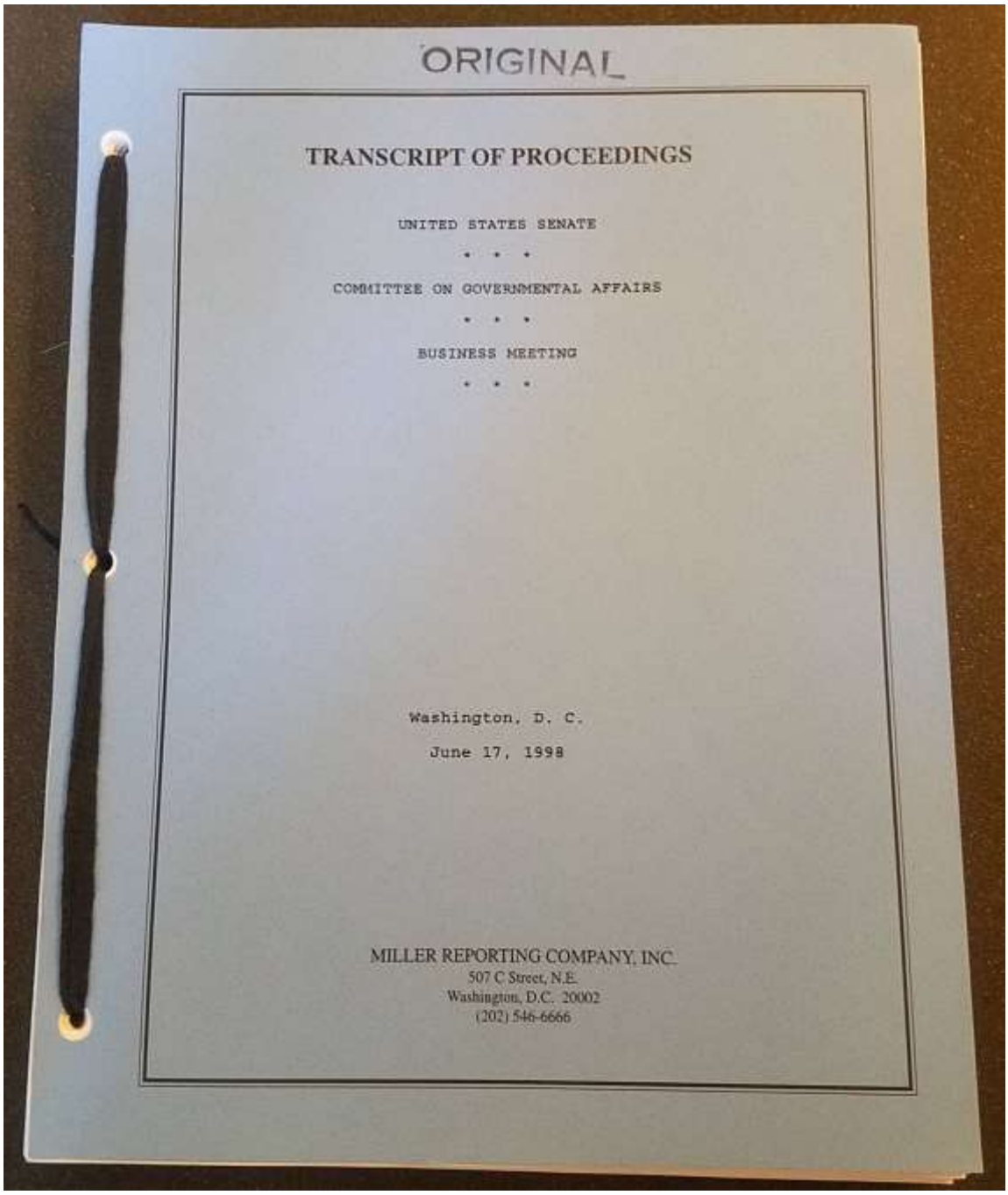
This author worked with archivists to view and photograph[205]these relevant and never-before-request records. Out of the over 1,000 pages of documents reviewed, about 300 were photographed, and only the most relevant are presented here. It should be noted that nowhere among the universe of documents reviewed did this author find any reliable suggestion or intent that FVRA could be used as an alternative or to displace automatic succession statutes.

(Linked)

[204] *See Senate Resolution 474 (96th Congress)*, NATIONAL ARCHIVES, https://www.archives.gov/legislative/research/senate-resolution-474.html (last modified Aug. 15, 2016).

[205] Photographs were taken of the documents because they best present the original versions. Photocopies could have been made, but for security reasons the Archives only allows them to be made on blue paper. Those wishing to view the other documents should contact the author via SSRN.com.

TRANSCRIPT OF PROCEEDINGS, JUNE 17, 1988 BUSINESS MEETING COMMITTEE ON GOVERNMENTAL AFFAIRS (GAC)



ORIGINAL

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENATE

* * *

COMMITTEE ON GOVERNMENTAL AFFAIRS

* * *

BUSINESS MEETING

* * *

Washington, D. C.

June 17, 1998

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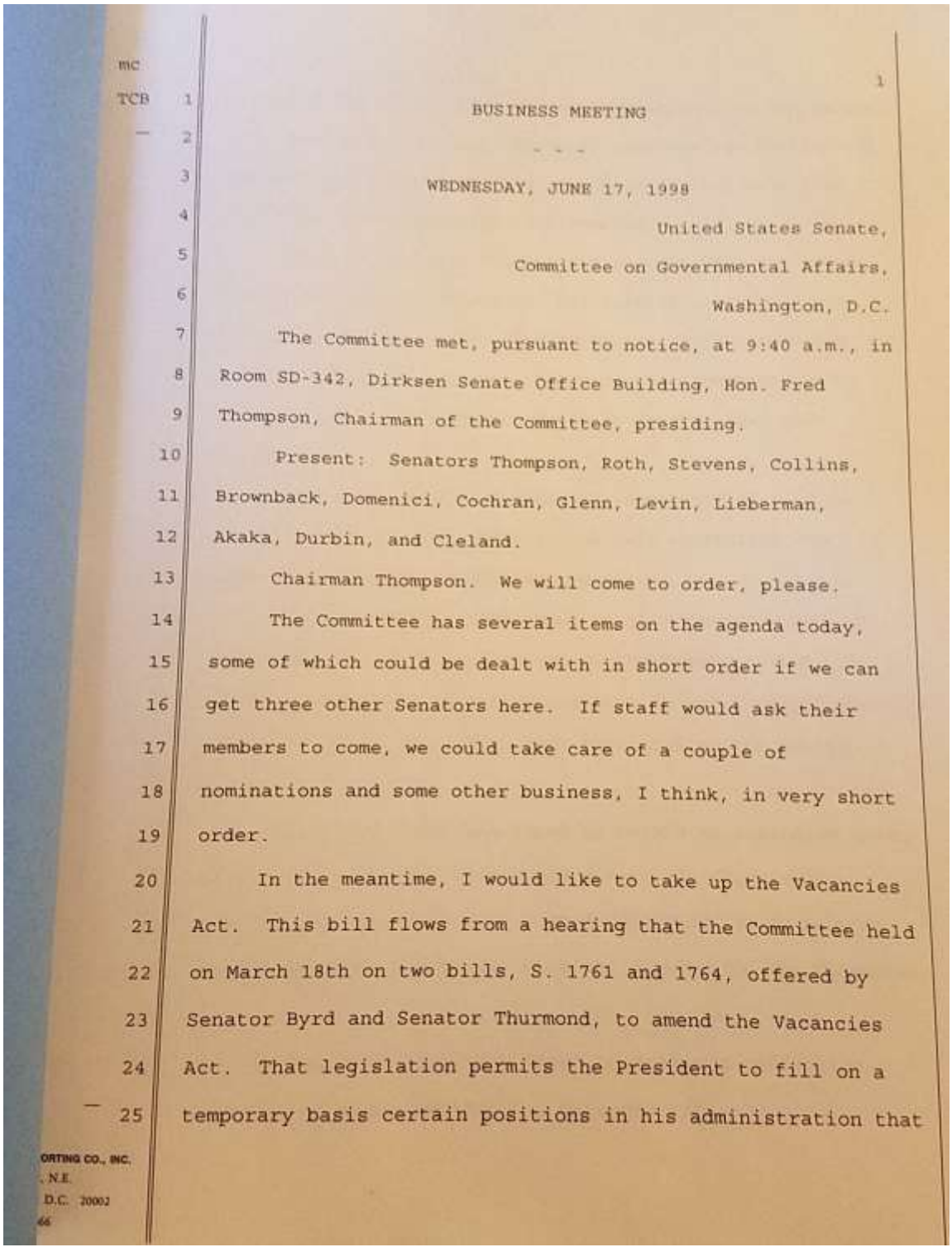

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BUSINESS MEETING

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WEDNESDAY, JUNE 17, 1998

United States Senate,

Committee on Governmental Affairs,

Washington, D.C.

The Committee met, pursuant to notice, at 9:40 a.m., in Room SD-342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Roth, Stevens, Collins, Brownback, Domenici, Cochran, Glenn, Levin, Lieberman, Akaka, Durbin, and Cleland.

Chairman Thompson. We will come to order, please.

The Committee has several items on the agenda today, some of which could be dealt with in short order if we can get three other Senators here. If staff would ask their members to come, we could take care of a couple of nominations and some other business, I think, in very short order.

In the meantime, I would like to take up the Vacancies Act. This bill flows from a hearing that the Committee held on March 18th on two bills, S. 1761 and 1764, offered by Senator Byrd and Senator Thurmond, to amend the Vacancies Act. That legislation permits the President to fill on a temporary basis certain positions in his administration that

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[Non-relevant parts omitted]

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in a difficult position, which I think I just did, unfortunately.

Chairman Thompson. I take it that that would be acceptable to certain members of this side of the aisle. What do you think?

Senator Stevens. I agree with her.

Chairman Thompson. All right. Shall we agree on 240, Senator Levin's amendment to the bill? All those in favor, say aye?

[A chorus of ayes.]

Chairman Thompson. Opposed, no?

Senator Domenici. I vote no.

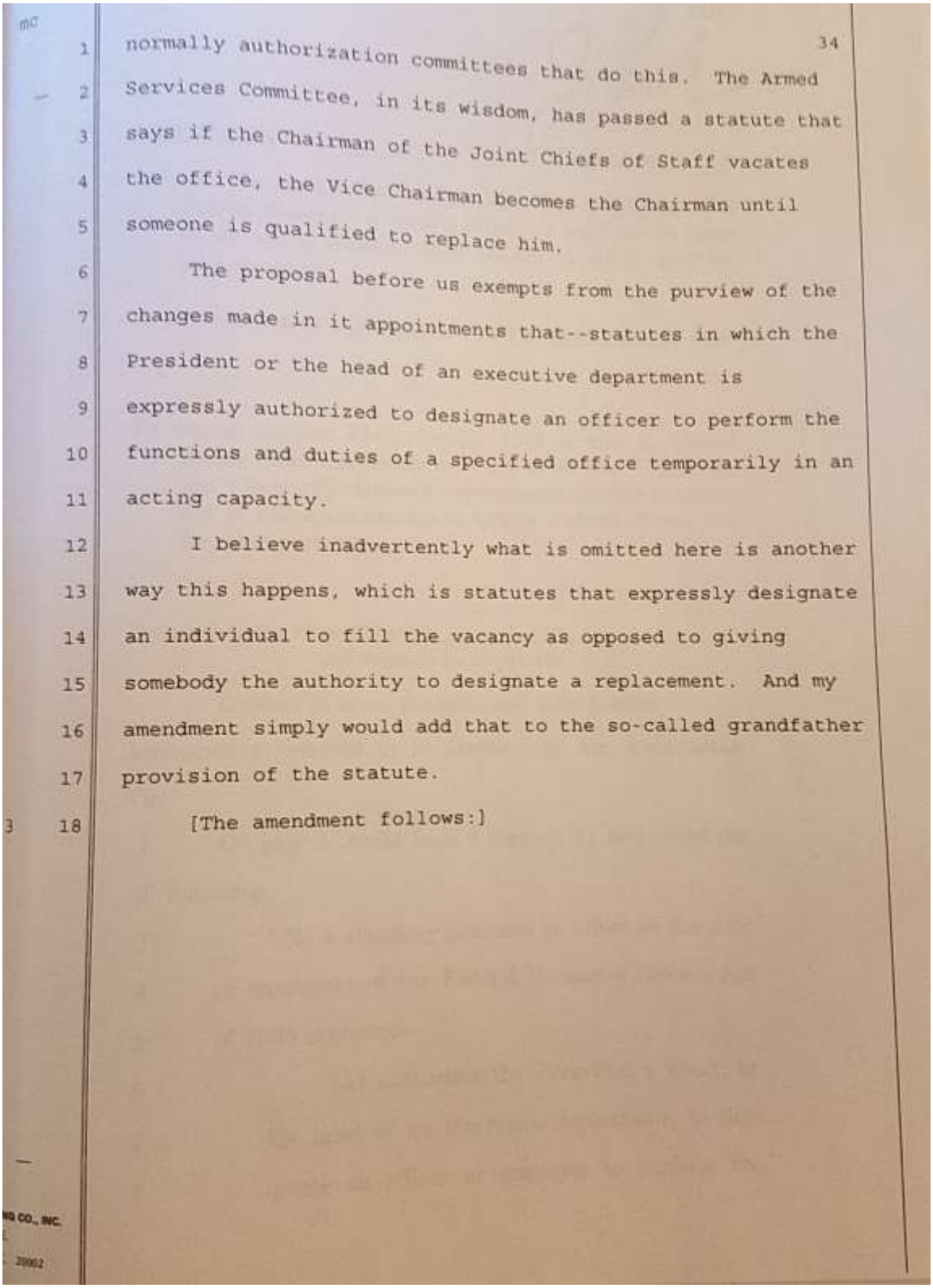
Chairman Thompson. The ayes carry.

Senator Lieberman. Mr. Chairman?

Chairman Thompson. Senator Lieberman?

Senator Lieberman. Very briefly, in its wisdom, in our wisdom, Congress has over the years exempted a number of positions, as you indicated earlier, from the Vacancies Act by providing a specific way to designate a replacement. The proposal that the Committee has brought forward in the Vacancies Act here makes clear that it is not our intention to override those specific judgments by previous Congresses that have taken different positions out of the Vacancies Act.

For instance, one that comes to mind--and these are



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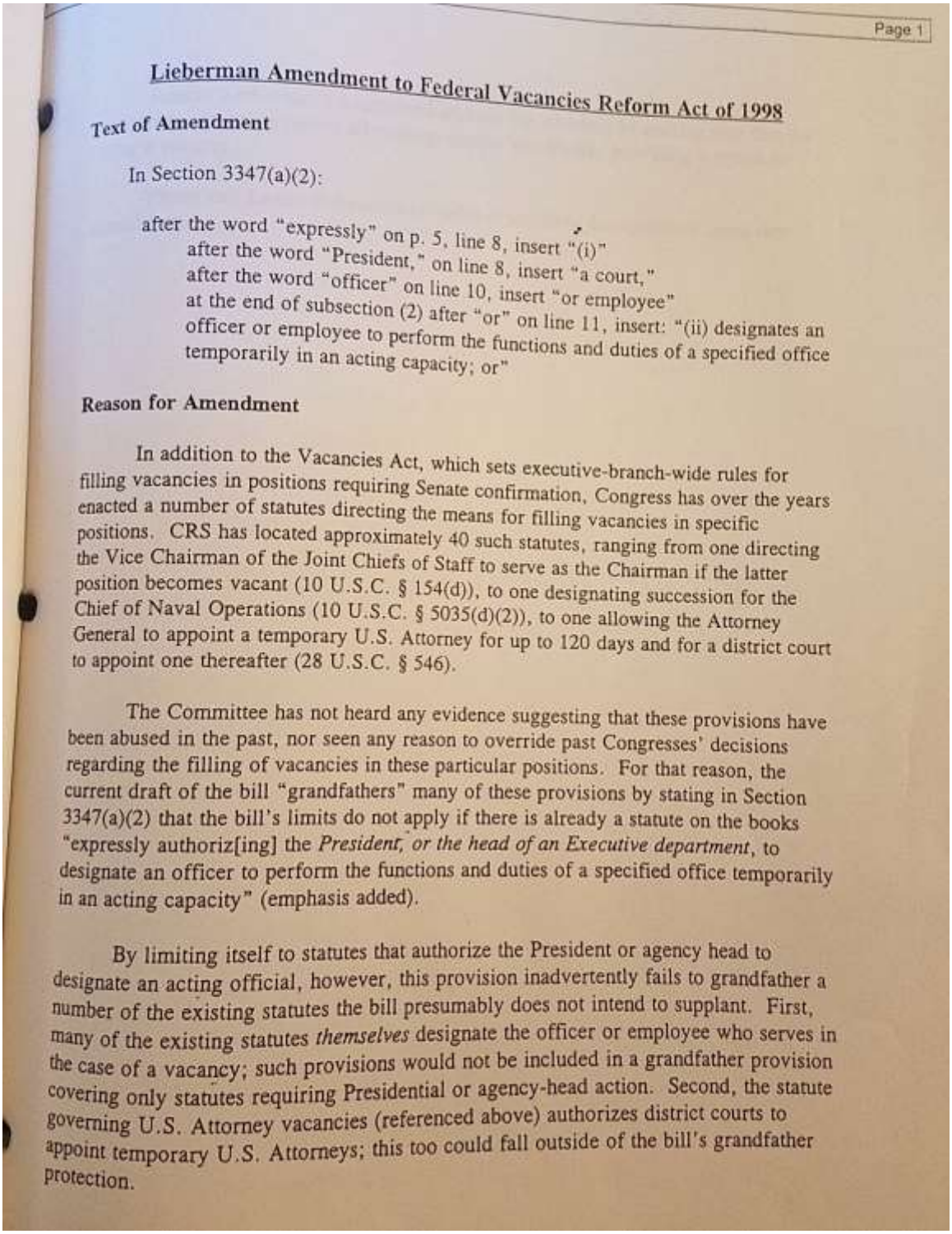
normally authorization committees that do this. The Armed Services Committee, in its wisdom, has passed a statute that says if the Chairman of the Joint Chiefs of Staff vacates the office, the Vice Chairman becomes the Chairman until someone is qualified to replace him.

The proposal before us exempts from the purview of the changes made in it appointments that--statutes in which the President or the head of an executive department is expressly authorized to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity.

I believe inadvertently what is omitted here is another way this happens, which is statutes that expressly designate an individual to fill the vacancy as opposed to giving somebody the authority to designate a replacement. And my amendment simply would add that to the so-called grandfather provision of the statute.

[The amendment follows:]

DESCRIPTION OF LIEBERMAN AMENDMENT (AS INCLUDED IN GAC TRANSCRIPT)



Lieberman Amendment to Federal Vacancies Reform Act of 1998

Text of Amendment

In Section 3347(a)(2):

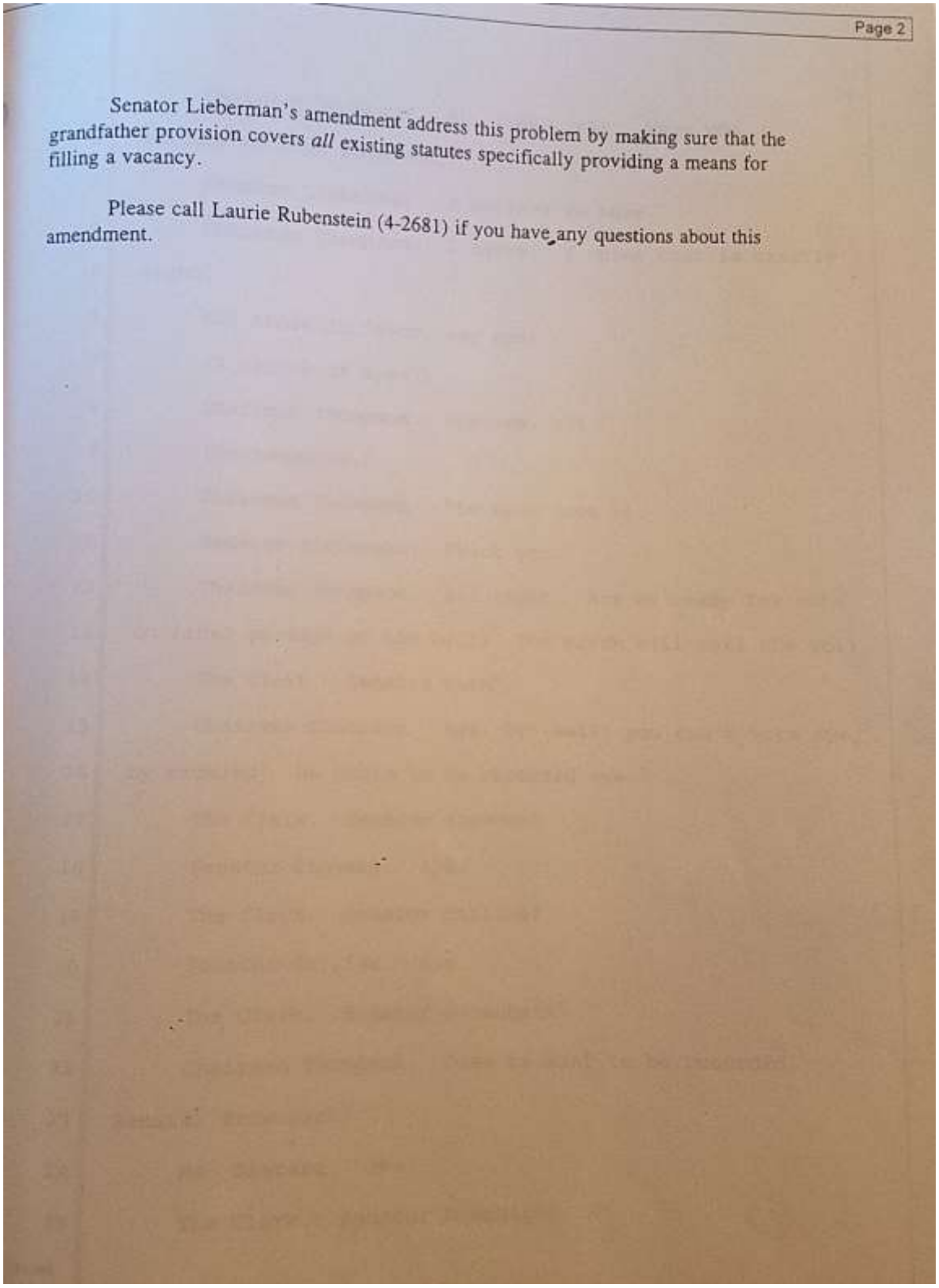
after the word "expressly" on p. 5, line 8, insert "(i)"
after the word "President," on line 8, insert "a court,"
after the word "officer" on line 10, insert "or employee"
at the end of subsection (2) after "or" on line 11, insert: "(ii) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or"

Reason for Amendment

In addition to the Vacancies Act, which sets executive-branch-wide rules for filling vacancies in positions requiring Senate confirmation, Congress has over the years enacted a number of statutes directing the means for filling vacancies in specific positions. CRS has located approximately 40 such statutes, ranging from one directing the Vice Chairman of the Joint Chiefs of Staff to serve as the Chairman if the latter position becomes vacant (10 U.S.C. § 154(d)), to one designating succession for the Chief of Naval Operations (10 U.S.C. § 5035(d)(2)), to one allowing the Attorney General to appoint a temporary U.S. Attorney for up to 120 days and for a district court to appoint one thereafter (28 U.S.C. § 546).

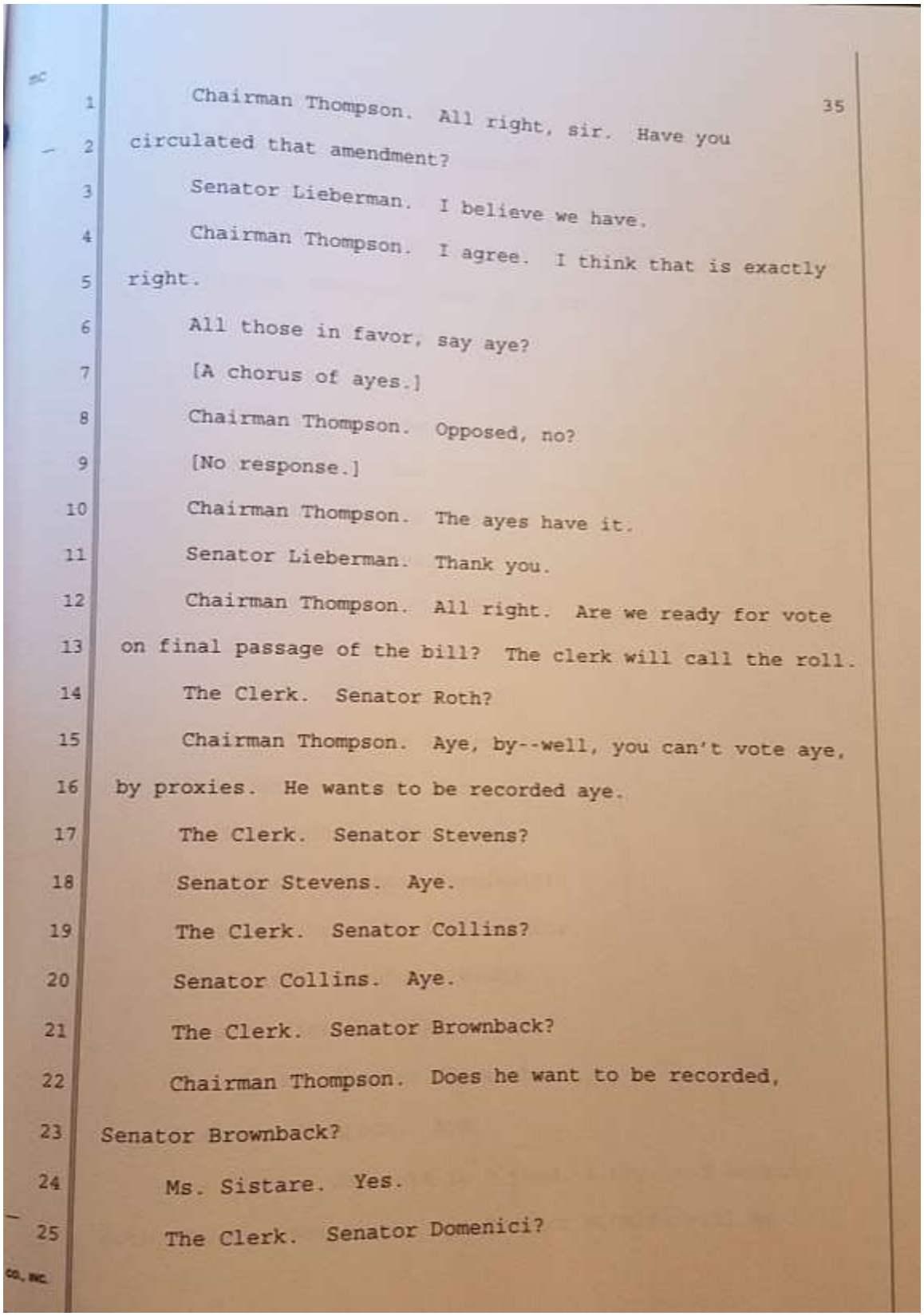
The Committee has not heard any evidence suggesting that these provisions have been abused in the past, nor seen any reason to override past Congresses' decisions regarding the filling of vacancies in these particular positions. For that reason, the current draft of the bill "grandfathers" many of these provisions by stating in Section 3347(a)(2) that the bill's limits do not apply if there is already a statute on the books "expressly authoriz[ing] the *President, or the head of an Executive department*, to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity" (emphasis added).

By limiting itself to statutes that authorize the President or agency head to designate an acting official, however, this provision inadvertently fails to grandfather a number of the existing statutes the bill presumably does not intend to supplant. First, many of the existing statutes *themselves* designate the officer or employee who serves in the case of a vacancy; such provisions would not be included in a grandfather provision covering only statutes requiring Presidential or agency-head action. Second, the statute governing U.S. Attorney vacancies (referenced above) authorizes district courts to appoint temporary U.S. Attorneys; this too could fall outside of the bill's grandfather protection.



Senator Lieberman's amendment address this problem by making sure that the grandfather provision covers *all* existing statutes specifically providing a means for filling a vacancy.

Please call Laurie Rubenstein (4-2681) if you have any questions about this amendment.



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Chairman Thompson. All right, sir. Have you circulated that amendment?

Senator Lieberman. I believe we have.

Chairman Thompson. I agree. I think that is exactly right.

All those in favor, say aye?

[A chorus of ayes.]

Chairman Thompson. Opposed, no?

[No response.]

Chairman Thompson. The ayes have it.

Senator Lieberman. Thank you.

Chairman Thompson. All right. Are we ready for vote on final passage of the bill? The clerk will call the roll.

The Clerk. Senator Roth?

Chairman Thompson. Aye, by--well, you can't vote aye, by proxies. He wants to be recorded aye.

The Clerk. Senator Stevens?

Senator Stevens. Aye.

The Clerk. Senator Collins?

Senator Collins. Aye.

The Clerk. Senator Brownback?

Chairman Thompson. Does he want to be recorded, Senator Brownback?

Ms. Sistare. Yes.

The Clerk. Senator Domenici?

JUNE 3, 1998 MEMO TO SENATOR LIEBERMAN RE: VACANCIES ACT BACKGROUND/AMENDMENTS

FOR 4:30 THURS MTG WITH GAC DEM. SENATORS

MEMORANDUM

To: Senator Lieberman (through Bill Bonvillian)
From: Laurie Rubenstein WBB
Re: The Vacancies Act
Date: June 3, 1998

In preparation for your meeting with Senator Glenn and other GAC Democrats, here is some background on the Vacancies Act and proposals to amend it. Senator Thompson plans to markup his proposal, which is problematic in a number of respects, within the next couple of weeks. He has asked to meet with Senator Glenn to discuss the issue, and in anticipation of that meeting, Senator Glenn called tomorrow's Democratic Member meeting to get a sense of the Democratic Members' perspectives on the issue.

BACKGROUND

Background on the Vacancies Act : The Constitution (art. II, sec. 2, cl. 2) provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." Recognizing that that process makes it difficult to immediately fill any vacancies that arise in such positions, Congress in 1868 enacted the Vacancies Act (5 U.S.C. §§ 3345-3349) to provide for the temporary filling of advice and consent positions pending the submission of, and action upon, a nomination. The Act's goal is to allow the Executive Branch to continue functioning in the face of a vacancy, while at the same time preserving the Senate's constitutional role in the appointment of executive branch officers. As the role of the federal government and the nature of the nomination process have changed, Congress has amended the Act on several occasions, most recently in 1988.

The Current Statute: As currently worded, the Vacancies Act provides that when an individual holding an executive branch or military department office requiring Senate confirmation dies, resigns, or is sick or absent, that person's "first assistant" -- a term the statute does not define, but which is often defined by regulation and which usually means the confirmed person's top deputy -- shall perform the duties of the office, unless the President appoints to the post someone already confirmed by the Senate for another position. To prevent the President from permanently staffing the executive branch via temporary appointments, **the Act limits such appointments to 120 days, unless the President submits a nomination to the Senate**, in which case the temporary appointee may continue to serve until the Senate confirms the nomination, or until 120 days after the rejection or withdrawal of the nomination. The Vacancies Act purports to provide the exclusive mechanism for making temporary appointments, providing that they "may not be made otherwise than as provided by [the Act]." (As discussed further below, however, Congress has provided

1988 Amendments: In 1988, Congress amended the Vacancies Act to, among other things, increase the authorized duration of a temporary appointment from 30 to 120 days. The Committee also sought to address DOJ's claim that the Act did not provide the exclusive means for filling vacancies. Although Congress did not enact specific statutory language rejecting DOJ's view, the GAC's report accompanying the bill stated that:

> the present language, however old, makes clear that the Vacancies Act is the exclusive authority for the temporary appointment, designation, or assignment of one officer to perform the duties of another whose appointment requires Senate confirmation. The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies. As such, the Committee expressly rejects the rationale and conclusions of other interpretations of the meaning and history of the Vacancies Act.

Some in Congress assert DOJ's refusal to accept the Vacancies Act's exclusivity flies in the face of this report language; DOJ takes the position that Congress should have amended the statute, not just provided report language, if it wanted to reject DOJ's views.

Current Congressional Interest in Amending the Act and Background on Staff Negotiations: Spurred on by the Bill Lann Lee case and a renewed desire to legislatively reject DOJ's circumvention of the Vacancies Act, Senators Byrd and Thurmond each have introduced legislation seeking to amend the Act. At Senator Byrd's request, the Committee held a hearing on the issue in March. Since that time, staff for Senators Byrd and Thurmond have been working with Committee staff to form a consensus bill, on the premise that Senator Lott (who is a cosponsor of the Thurmond proposal) is highly unlikely to give floor time this session to a controversial bill, making it necessary to have a bipartisan and widely supported proposal. Senator Thompson's staff has drafted their own bill, which the Chairman hopes to markup this month. Although everyone seems to agree (1) that general provisions in agencies' organizational statutes should not override the Vacancies Act, and (2) that the Act should contain some mechanism for enforcing its dictates, staff negotiations have bogged down over a number of significant details, discussed further below. Meanwhile, White House staff with whom we have been meeting have has told us that they would recommend a presidential veto of the current Thompson draft. Senator Glenn called tomorrow's meeting in the hope of feeling out the Committee Democrats on the outstanding issues, to see the extent to which the Members are willing (1) to push Thompson to be reasonable and (2) to potentially diverge from Senator Byrd's views on the issue.

THE THOMPSON PROPOSAL AND OPEN ISSUES

Recognizing that DOJ's interpretation originated in a Republican Justice Department

and that all recent Administrations have violated the Act, Democratic staff have viewed this issue as an institutional (Senate versus Executive) rather than a partisan one. Senator Thompson's staff, in contrast, has been suspicious of non-Byrd Democratic suggestions throughout the process, and his draft contains a number of provisions that appear punitive toward this particular Administration. Indeed, Senator Thompson's staffer told us that his direction in drafting the bill was to imagine it being implemented by the most duplicitous Administration and make sure there was no way for them to get around it.

Current Provisions of Thompson Draft: Thompson's draft would repeal the existing Vacancies Act and replace it with an entirely new one. His proposal's main provisions include the following:

- *Who may temporarily fill the office*: Thompson's draft permits the President to temporarily appoint either (a) someone already confirmed by the Senate for another position, or (b) the person who served as first assistant to the former occupant of the office. This is similar to current law, except Thompson's draft would allow the President to choose the first assistant only if that person has served in that position for 180 out of the previous 365 days. This latter provision responds to the Bill Lann Lee case; the AG appointed Lee as Principal Deputy Assistant AG for Civil Rights one day before making him Acting Assistant AG. As Democratic staff have pointed out, however, the 180-day requirement seems a bit of overkill, particularly since there may be many legitimate cases in which a first assistant has served for less than 180 days before the person he assists vacates a post.

- *Duration of Temporary Appointment*: Thompson's draft provides that the temporary appointee could fill the post for 120 days from the date of the vacancy, unless a nomination is submitted within the 120-day period, in which case the temporary appointee could continue to serve until the nominee is confirmed or until 120 days after the nomination is withdrawn or rejected. If the President misses the 120-day window for submitting a nomination, then the post may not be filled at all (after the 120 days) until the Senate confirms someone for the position. As discussed further below, this is a serious point of contention.

- *Exclusivity of Vacancies Act*: The Thompson draft purports to make the Vacancies Act exclusive, providing that no other Act overrides it unless "another statutory provision specifically provides that such provision supersedes [this Act]." As noted further below, this too is a big point of contention, because Thompson's language would override approximately 40 existing statutes providing for the filling of vacancies in specific departments and

agencies.

- *Enforcement Mechanism*: Thompson's draft provides that if an office other than that of an agency head is vacant for more than 120 days without the submission of a nomination, then only an agency head can perform the functions or duties of that office until someone is confirmed for the position. In other words, if an Assistant Secretary of Commerce position is vacant and the President does not nominate someone within 120 days of the vacancy, then only the Secretary of Commerce can perform that Assistant Secretary's functions or duties. This is an advance over Thompson's first draft, which would not have allowed *anyone* to perform those functions or duties, but is still problematic, because the Thompson draft defines "function or duty" as any function or duty established for the office by statute or regulation, and presumably many statutes or regulations vest numerous duties in each officer, making it potentially very onerous to require the Department head to perform all of those duties in the case of a vacancy.

Issues with Thompson Draft: As just touched upon, although Thompson's draft is a good start, it has a number of serious problems that should be addressed before it becomes law.

- *Time Limit on Acting Appointment Absent Presidential Submission of Nomination*: The Administration informs us that the realities of today's vetting process make it impossible to submit most nominees to the Senate within 120 days of a vacancy. The White House Personnel Office states that the average nomination takes 180 days, and they would like the amendments to give them 180 days plus a provision allowing for an exception in emergency circumstances. Unfortunately, White House Personnel has not been particularly forthcoming with statistics to justify this figure (we've repeatedly asked them for statistics on how may vacancies there are at any given time, how many people they have waiting for FBI checks, how long it takes to get the FBI checks done, how many people the Administration has working on this stuff, etc.; we've received little back as of now). Without strong statistics to support them, it will be hard to convince either Senator Thompson or Senator Byrd that it really takes 6 months to submit someone's name to the Senate, although Senator Byrd likely would be willing to give more than 120 days, perhaps up to 150 days.

- *Whether Submitting a Nomination after Expiration of the Time Limit Should "Cure" the Violation*: This is a **critical** issue, particularly if we end up giving the Administration less time than they believe is necessary to submit a

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nomination, thereby potentially leading them to repeatedly miss the deadline. Under Thompson's draft, once the Administration misses the 120-day deadline for submitting a nominee for a particular position -- even if they submit a nominee on day 121 -- the office must remain vacant until the Senate confirms someone for it. In such circumstances, the head of the agency is the only one empowered to perform the vacant office's duties and functions. Democratic staff believe this makes no sense, is unnecessarily punitive, and makes for bad government. After all, the goal of the Vacancies Act is to protect the Senate's role in the appointment of officers. That goal is served as soon as the President sends the Senate a nominee. Once that happens, there simply is no rationale, other than a punitive one, for refusing to allow a temporary appointment. Moreover, adopting such a rule could backfire on the Senate. To begin with, forcing a critical government position to remain empty, potentially for months, simply because the President missed a deadline by a few days, punishes not just the President, but Congress (whose laws may not be being executed) and the people (who may be losing services). Moreover, if the Vacancies Act becomes too onerous, the President may simply ignore Congress altogether by resorting to a separate constitutional mechanism for making appointments: the one authorizing the President to fill vacancies by himself during Congressional recesses (recess appointments last until the end of the Congress' next session). It is unclear how diminishing the government's ability to function or encouraging the President to cut Congress out of the process serves the Senate's goals of participating in the appointments process. Democratic staff have made these arguments to Thompson's staffer. He suggests that Thompson is comfortable with his provision.

Whether the Vacancies Act Should Override other Specific and Existing Statutes Providing for Temporary Appointments to Vacant Positions ("Exclusivity"): As mentioned above, everyone agrees that neither DOJ nor any other Department or agency should be allowed to use its general organic statutes to override the Vacancies Act's mandates. Democratic staff disagree with Senator Thompson's staff, however, on whether to override a second category of statutes -- those explicitly providing for the filling of vacancies in specific agencies. CRS has located approximately 40 such statutes, ranging from one directing the Vice Chairman of the Joint Chiefs of Staff to serve as the Chairman if the latter position becomes vacant, to one designating succession for the Chief of Naval Operations, to one allowing the Attorney General to appoint a temporary U.S. Attorney for up to 120 days and for a district court to appoint one thereafter. Thompson's staffer says that Thompson has no problems with overriding these statutes. Democratic staff believe that such an override would be inappropriate. Previous Congresses presumably had good reasons for enacting specific

vacancies statutes for some agencies, and there is no evidence that those statutes have been abused. Moreover, GAC should show some comity to other Committees with jurisdiction over these specific statutes -- is it really our place, for example, to override SASC's decision to designate the means for dealing with vacancies in the Armed Forces?

- *How to Enforce the Act's Provisions*: Finally, there is significant disagreement over the Act's enforcement mechanism. As mentioned above, Senator Thompson's draft provides that if the President does not nominate anyone within 120 days, only the head of an agency can perform the duties and functions of the vacant office. Thompson's staff dismisses claims that this could prove both burdensome to a Cabinet Secretary or agency head and confusing to others as everyone struggles to define the precise nature of the vacant position's duties and functions to determine what only the Cabinet Secretary may do. When combined with the absence of a "cure" mechanism noted above, this state of confusion and burden could persist for months and, potentially, years. Particularly worrisome to me is the potential for litigation arising over the Thompson draft's provision that any action taken by someone exercising authority in violation of the Act has no force or effect and may not be ratified. Democratic staff have suggested providing that any statutorily vested, nondelegable duties of the vacant office must be performed by the agency head, but that delegable duties may be performed by someone else.

* * * * *

The Thompson draft contains a number of provisions Democratic staff view as unwise and potentially harmful. Although Thompson's staffer has rejected these criticisms thus far, it is unclear whether he really speaks for Senator Thompson, and whether Senator Thompson would reject suggestions for change if he knew of other Member's interest and their willingness to push these issues via amendment at a mark-up (how, for example, could Thompson really publicly defend GAC overriding the order of succession for the Joint Chiefs?) Because Democratic staff's suggestions seem eminently reasonable to me, I have high hopes that we can resolve some, if not most, of these issues if the Democratic Members agree with staff's assessment and are willing to discuss these issues with Senator Thompson (and possibly Senator Byrd).

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JUNE 4, 1998 MEMO TO SENATOR THOMPSON RE: VACANCIES ACT

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MEMORANDUM

TO: Sen. Thompson

FROM: Fred Ansell

DATE: June 4, 1998

RE: Vacancies Act

In preparation for your meeting with Sen. Glenn, I wanted to update you on the latest state of play, which has changed just a bit since Monday, when I gave you my last memo.

(1) Democrat staff draft. My last memo described some of the major issues that separate the Democrat staff from your last draft. Yesterday, David Plocher circulated a new Democrat staff draft. It has changed little since our last staff meeting, but since it is not too long, I thought you might be interested in seeing it. I have marked the portions that I think are unacceptable. In addition to the major points, you will notice poor drafting of the newly inaugurated president section and its inclusion of additional 30 days exceptions with no justification. I also think that allowing a first assistant to serve as acting so long as the person was the first assistant for 30 days is a non-starter because it allows a Bill Lann Lee to be used to game the system for 30 days before the vacancy was created, opening a large loophole for inappropriate acting officials. One way you might be willing to compromise on the issue of first assistant would be to say that if the first assistant is someone who received Senate confirmation to serve in that position, then the prior length of service requirement of first assistant would not apply.

(2) On the issue of the prior existing laws that provide for acting officials to serve in ways other than the Vacancies Act, such as U.S. Attorneys, Thurmond has a few issues. His staff was unaware of the special provisions that allow indefinite service by acting Chairmen of the Joint Chiefs as well as Chief of Staff of the Army, Navy, etc., when Thurmond drafted his bill. Thurmond's Armed Services staff would like those provisions to survive any overall Vacancies Act revision. It may be that one of the areas that could be the subject of compromise for actually reaching a deal would preserve the prior statutes that provide for acting officials in specific cases, but that would say that a law that gives the head of the department the ability to delegate and assign duties to subordinates does not override the Vacancies Act.

(3) Byrd. Byrd's staff recently asked him his thoughts on some of the main issues that were dividing staff. Byrd thinks the enforcement mechanism should be as you proposed. The head of the agency should be the only person who can perform the duties. He thinks the "non-delegable duties" approach is essentially meaningless because so few of the lower level positions have specific duties. He also favors an acting period that is shorter rather than longer. Although I cannot give you a maximum number of days, 180 is too many for Byrd. On two other issues, Byrd is closer to Glenn. He may be willing to accept the notion that even if 120 days have elapsed before a nominee is submitted, if a nominee is sent up on the 130th day, the President

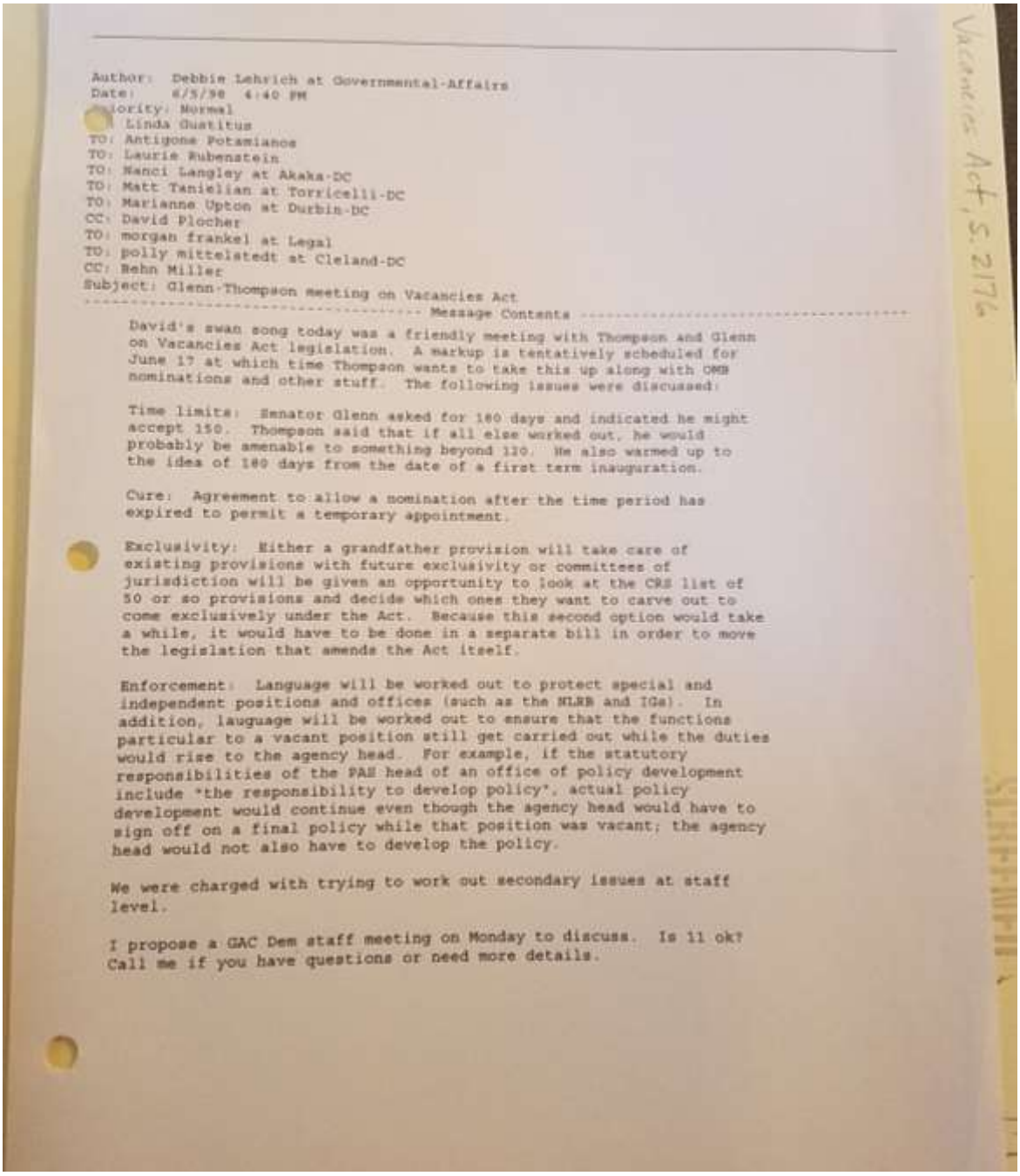
could have his acting official, whereas your draft says that once the 120 days are up, no one else can serve until the Senate confirms a nominee. (If that were the position adopted, then there certainly would be no reason to increase the 120 day acting service period). Finally, Byrd was also not thinking about existing statutes that affect specific vacancies in specific positions. His concern was making the statute exclusive, rejecting the Justice Department's argument about its organic statute, and requiring future Congresses to explicitly say that the Vacancies Act would be overridden if it were not to apply. His staff told me that this concern is how language to that effect can be drafted. I told his staff that I did not think the issue was a drafting question because such language could be written. Rather, I told him that I thought the problem would be drafting a bill that would bind future Congresses: if there were any conflict between this bill and a later-enacted law, the later enacted law would apply.

(4) Glenn. Finally, this week, I was informed that there are efforts being made to deal with the treatment of vacancies in a particular position. The general counsel of the Federal Labor Relations Agency (the government employee equivalent of the NLRB) is of the same nature as the general counsel of the NLRB. The general counsel is a presidential appointment with advice and consent of the Senate. The agency cannot bring charges on its own but can only do so through the general counsel. For that reason, your draft bill provides that if there is a vacancy in the NLRB general counsel position, and no nominee is submitted within 120 days, the duties of that position are not transferred to the head of the agency, since that defeats the entire purpose Congress had in preventing the head of the agency from making charging decisions. It would be easy enough to do that for the FLRA.

So far, I have not found one agency that thinks it is currently covered by the Vacancies Act, including the FLRA. In their view, based on DOJ advice, the Vacancies Act does not apply to the general counsel position at FLRA since the FLRA is an executive agency but not an executive department (an issue under the law's current language) and the general counsel is not the head of an agency. Unlike other positions allegedly not governed by the Vacancies Act, which means that the acting official serves indefinitely, the FLRA general counsel cannot be acting at all because there is no statutory authority permitting an acting official. Thus, in 1988 and 1992, when vacancies occurred in the general counsel position, the agency essentially shut down because no new cases could be brought until a new general counsel was confirmed.

The FLRA is trying to get Congress to pass a fix for the FLRA general counsel. In fact, Sen. Glenn submitted a letter to the Appropriations Committee recently asking that such a fix be attached to an appropriations bill. I spoke with Appropriations staff and told them that this was unacceptable. The bill you have circulated covers the FLRA, so the problem would be fixed. Moreover, you want a comprehensive solution to all the problems with the Vacancies Act, and possibly an exclusive act, so you would be strongly opposed to a piecemeal Vacancies Act bill that might reduce some of the pressure to fix the overall statute. What is cause for concern is that Glenn, assuming he knew about the letter, but certainly his staff, asked that a piecemeal approach be taken, that the fix not be dealt with by the Committee of jurisdiction, but through legislating on an appropriations bill and without consulting you, and that such a fix could only impede passing comprehensive Vacancies Act reform.

JUNE 5, 1998 MESSAGE RE: GLENN-THOMPSON MEETING ON VACANCIES ACT



Vacancies Act, S. 2176

Author: Debbie Lehrich at Governmental-Affairs
Date: 6/5/98 4:40 PM
Priority: Normal
TO: Linda Gustitus
TO: Antigone Potamianos
TO: Laurie Rubenstein
TO: Nanci Langley at Akaka-DC
TO: Matt Tanielian at Torricelli-DC
TO: Marianne Upton at Durbin-DC
CC: David Plocher
TO: morgan frankel at Legal
TO: polly mittelstedt at Cleland-DC
CC: Rehn Miller
Subject: Glenn-Thompson meeting on Vacancies Act

---------- Message Contents ----------

David's swan song today was a friendly meeting with Thompson and Glenn on Vacancies Act legislation. A markup is tentatively scheduled for June 17 at which time Thompson wants to take this up along with OMB nominations and other stuff. The following issues were discussed:

Time limits: Senator Glenn asked for 180 days and indicated he might accept 150. Thompson said that if all else worked out, he would probably be amenable to something beyond 120. He also warmed up to the idea of 180 days from the date of a first term inauguration.

Cure: Agreement to allow a nomination after the time period has expired to permit a temporary appointment.

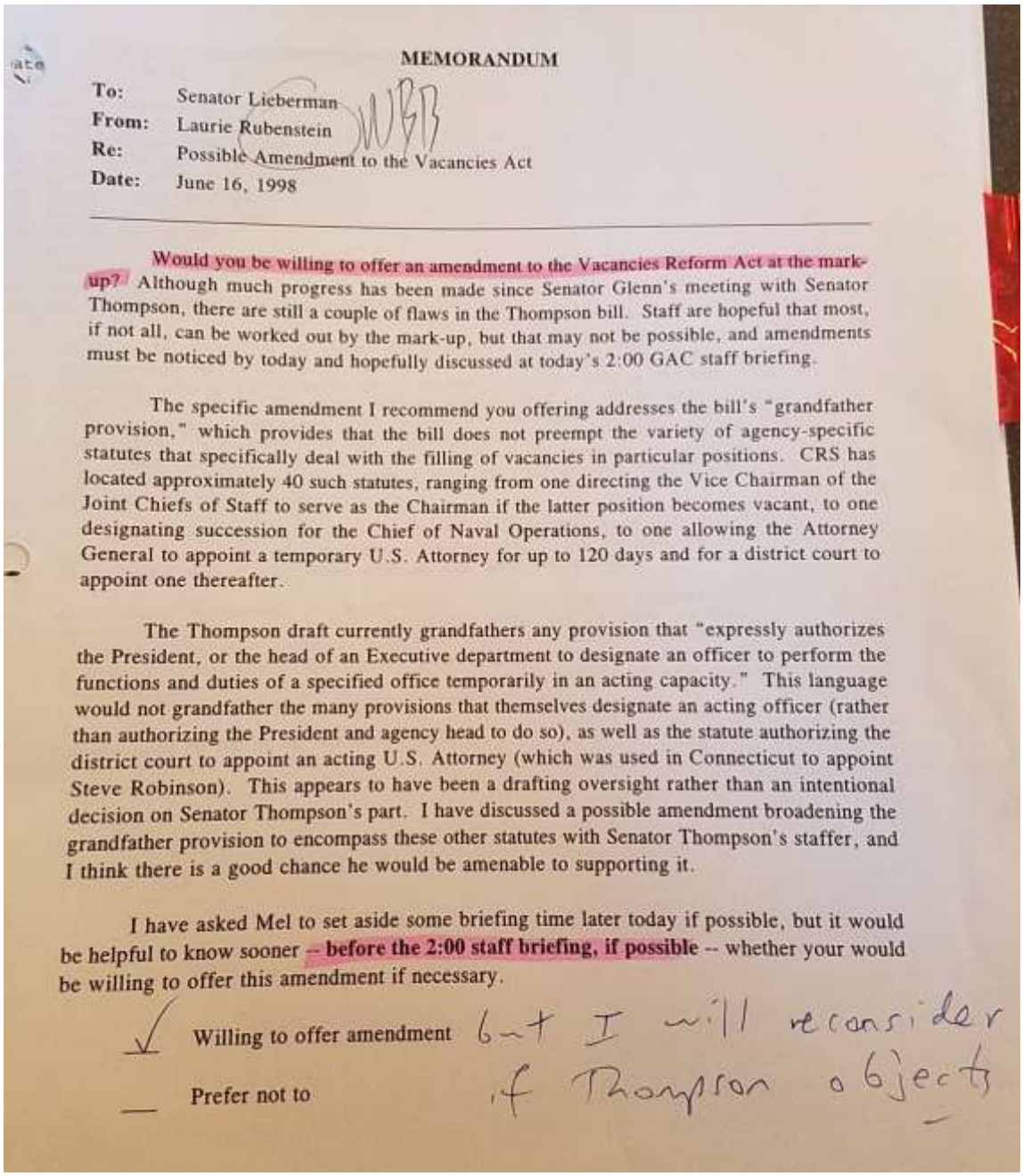
Exclusivity: Either a grandfather provision will take care of existing provisions with future exclusivity or committees of jurisdiction will be given an opportunity to look at the CRS list of 50 or so provisions and decide which ones they want to carve out to come exclusively under the Act. Because this second option would take a while, it would have to be done in a separate bill in order to move the legislation that amends the Act itself.

Enforcement: Language will be worked out to protect special and independent positions and offices (such as the NLRB and IGs). In addition, lauguage will be worked out to ensure that the functions particular to a vacant position still get carried out while the duties would rise to the agency head. For example, if the statutory responsibilities of the PAS head of an office of policy development include "the responsibility to develop policy", actual policy development would continue even though the agency head would have to sign off on a final policy while that position was vacant; the agency head would not also have to develop the policy.

We were charged with trying to work out secondary issues at staff level.

I propose a GAC Dem staff meeting on Monday to discuss. Is 11 ok? Call me if you have questions or need more details.

JUNE 16, 1998 MEMO TO SENATOR LIEBERMAN RE: POSSIBLE AMENDMENT TO VACANCIES ACT



MEMORANDUM

To: Senator Lieberman
From: Laurie Rubenstein
Re: Possible Amendment to the Vacancies Act
Date: June 16, 1998

Would you be willing to offer an amendment to the Vacancies Reform Act at the mark-up? Although much progress has been made since Senator Glenn's meeting with Senator Thompson, there are still a couple of flaws in the Thompson bill. Staff are hopeful that most, if not all, can be worked out by the mark-up, but that may not be possible, and amendments must be noticed by today and hopefully discussed at today's 2:00 GAC staff briefing.

The specific amendment I recommend you offering addresses the bill's "grandfather provision," which provides that the bill does not preempt the variety of agency-specific statutes that specifically deal with the filling of vacancies in particular positions. CRS has located approximately 40 such statutes, ranging from one directing the Vice Chairman of the Joint Chiefs of Staff to serve as the Chairman if the latter position becomes vacant, to one designating succession for the Chief of Naval Operations, to one allowing the Attorney General to appoint a temporary U.S. Attorney for up to 120 days and for a district court to appoint one thereafter.

The Thompson draft currently grandfathers any provision that "expressly authorizes the President, or the head of an Executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity." This language would not grandfather the many provisions that themselves designate an acting officer (rather than authorizing the President and agency head to do so), as well as the statute authorizing the district court to appoint an acting U.S. Attorney (which was used in Connecticut to appoint Steve Robinson). This appears to have been a drafting oversight rather than an intentional decision on Senator Thompson's part. I have discussed a possible amendment broadening the grandfather provision to encompass these other statutes with Senator Thompson's staffer, and I think there is a good chance he would be amenable to supporting it.

I have asked Mel to set aside some briefing time later today if possible, but it would be helpful to know sooner -- **before the 2:00 staff briefing, if possible** -- whether your would be willing to offer this amendment if necessary.

✓ Willing to offer amendment but I will reconsider if Thompson objects

___ Prefer not to

APPENDIX F

TABLE OF THE 40-SOME APPOINTMENT STATUTES IDENTIFIED AS RETAINED BY FVRA

No.	Office	Statute	Text of Provision	Option Type
1	Administrator, DEA	5 U.S.C. Appendix Reorg. Plan No. 2 of 1973 § 5 (b), (c) (two alternatives)	(b) There shall be in the Administration a Deputy Administrator of the Drug Enforcement Administration, hereinafter referred to as "the Deputy Administrator," who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Attorney General may from time to time direct . . . . (c) The Deputy Administrator or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.	(1)(A)
2	Administrator, EPA	5 U.S.C. Appendix Reorganization Plan No. 3 of 1970, § 1 (c).	(c)The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.	(1)(B)
3	Administrator, FAA	49 U.S.C. § 106(*i*)	(*i*) The Deputy Administrator shall carry out duties and powers prescribed by the Administrator. The Deputy Administrator acts for the Administrator when the Administrator is absent or unable to serve, or when the office of the Administrator is vacant.	(1)(B)
4.	Administrator, GSA	40 U.S.C. § 751(c)) (Transferred to 40 U.S.C. § 302 in 2002 during the codification of title 40.)	(b) . . . The Deputy Administrator is Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President designates another officer of the Federal Government, when the office of Administrator is vacant.	(1)(A)
5.	Administrator, NOAA	5 U.S.C. Appendix 1 Reorganization Plan No. 4 of 1970, § 2(c)	(c) There shall be in the Administration a Deputy Administrator of the National Oceanic and Atmospheric Administration who shall be appointed by the President, by and with the advice and consent of the Senate, ... The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.	(1)(B)
6.	Administrator, SBA	15 U.S.C. § 633(b)(1)	(b)(1) The management of the Administration shall be vested in an Administrator who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and who shall be a person of outstanding qualifications known to be familiar and sympathetic with small-business needs and problems. . . . . The President also may appoint a Deputy Administrator, by and with the advice and consent of the	(1)(B)

			Senate.. . . . The Deputy Administrator shall be Acting Administrator of the Administration during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator.	
7.	Archivist, NARA	44 U.S.C. § 2103(c)	(a) The Archivist of the United States shall be appointed by the President by and with the advice and consent of the Senate. The Archivist shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist. The Archivist may be removed from office by the President. The President shall communicate the reasons for any such removal to each House of the Congress. [. . . .] (c) There shall be in the Administration a Deputy Archivist of the United States, who shall be appointed by and who shall serve at the pleasure of the Archivist. . . . During any absence or disability of the Archivist, the Deputy Archivist shall act as Archivist. In the event of a vacancy in the office of the Archivist, the Deputy Archivist shall act as Archivist until an Archivist is appointed under subsection (a).	(1)(B)
8.	Attorney General	28 U.S.C. § 508(a)	(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.	(1)(B) (for the codification problem with "may" see Parts I.A, II.A, & Appendix A)
9.	Attorney General	28 U.S.C. § 508(b)	(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.	(1)(B)
10.	Chairman, Joint Chiefs	10 U.S.C. § 154(d)	(a) Appointment.-(1) There is a Vice Chairman of the Joint Chiefs of Staff, appointed by the President, by and with the advice and consent of the Senate, from the officers of the regular components of the armed forces. (b) Requirement for Appointment.-(1) The President may appoint an officer as Vice Chairman of the Joint Chiefs of Staff only if the officer- (A) has the joint specialty under section 661 of this title; and (B) has completed a full tour of duty in a joint duty assignment (as defined in section 664(f) 1 of this title) as a general or flag officer.	(1)(B)

			. . . . (d) Function as Acting Chairman.-When there is a vacancy in the office of Chairman or in the absence or disability of the Chairman, the Vice Chairman acts as Chairman and performs the duties of the Chairman until a successor is appointed or the absence or disability ceases.	
11.	Chairman, Joint Chiefs	10 U.S.C. § 154(e)	(e) Succession After Chairman and Vice Chairman.-When there is a vacancy in the offices of both Chairman and Vice Chairman or in the absence or disability of both the Chairman and the Vice Chairman, or when there is a vacancy in one such office and in the absence or disability of the officer holding the other, the President shall designate a member of the Joint Chiefs of Staff to act as and perform the duties of the Chairman until a successor to the Chairman or Vice Chairman is appointed or the absence or disability of the Chairman or Vice Chairman ceases.	(1)(B) (non-traditional) The President has to appoint, and must do so only from the small specified pool of Joint Chiefs. Although not automatic, this statute must control since choosing anyone else would violate the statute.
12.	Chief Judge, Court of Veterans Appeals	38 U.S.C. § 7254(d)	[*Note: The relevant part of this provision has been amended and removed*: 1999-Subsec. (d). Pub. L. 106–117 inserted heading and amended text of subsec. (d) generally. Prior to amendment, text read as follows: "In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve as acting chief judge unless the President designates one of the other associate judges to serve as acting chief judge, in which case the judge so designated shall serve as acting chief judge."]	(1)(B) (non-traditional) Selected from limited pool of associate judges. Same explanation as above as to why.
13.	Chief of Naval Operations	10 U.S.C. § 5035(d)(2)	§5035. Vice Chief of Naval Operations (a) There is a Vice Chief of Naval Operations, appointed by the President, by and with the advice and consent of the Senate, from officers on the active-duty list in the line of the Navy serving in grades above captain and eligible to command at sea. (b) The Vice Chief of Naval Operations, while so serving, has the grade of admiral without vacating his permanent grade. (c) The Vice Chief of Naval Operations has such authority and duties with respect to the Department of the Navy as the Chief of Naval Operations, with the approval of the Secretary of the Navy, may delegate to or prescribe for him. Orders issued by the Vice Chief of Naval Operations in performing such duties have the same effect as those issued by the Chief of Naval Operations. (d) When there is a vacancy in the office of Chief of	(1)(B) as to the Vice CNO serving as the CNO (1)(B) (non-traditional) when both are vacant (limited pool, assuming other laws require a naval officer to be the highest ranking officer in the Navy)

			Naval Operations or during the absence or disability of the Chief of Naval Operations- (1) the Vice Chief of Naval Operations shall perform the duties of the Chief of Naval Operations until a successor is appointed or the absence or disability ceases; or (2) if there is a vacancy in the office of the Vice Chief of Naval Operations or the Vice Chief of Naval Operations is absent or disabled, unless the President directs otherwise, the most senior officer of the Navy in the Office of the Chief of Naval Operations who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of the Chief of Naval Operations until a successor to the Chief of Naval Operations or the Vice Chief of Naval Operations is appointed or until the absence or disability of the Chief of Naval Operations or Vice Chief of Naval Operations ceases, whichever occurs first.	
14.	Chief of Staff of the Air Force	10 U.S.C. § 8034(d)(2)	§ 8034. Vice Chief of Staff (a) There is a Vice Chief of Staff of the Air Force, appointed by the President, by and with the advice and consent of the Senate, from the general officers of the Air Force. (b) The Vice Chief of Staff of the Air Force, while so serving, has the grade of general without vacating his permanent grade. [. . . .] (d) When there is a vacancy in the office of Chief of Staff or during the absence or disability of the Chief of Staff- (1) the Vice Chief of Staff shall perform the duties of the Chief of Staff until a successor is appointed or the absence or disability ceases; or (2) if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled, unless the President directs otherwise, the most senior officer of the Air Force in the Air Staff who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of the Chief of Staff until a successor to the Chief of Staff or the Vice Chief of Staff is appointed or until the absence or disability of the Chief of Staff or Vice Chief of Staff ceases, whichever occurs first.	(1)(B) as to the Vice CoS serving as the CoS (1)(B) (non-traditional) when both are vacant (limited pool, assuming other laws require an AF officer to be CoS)
15.	Chief of Staff of the Army	10 U.S.C. § 3034(d)(2)	§ 3034. Vice Chief of Staff (a) There is a Vice Chief of Staff of the Army, appointed by the President, by and with the advice and consent of the Senate, from the general officers of the Army.	(1)(B) as to the Vice CoS serving as the CoS (1)(B)

			(b) The Vice Chief of Staff of the Army, while so serving, has the grade of general without vacating his permanent grade. [. . . .] (d) When there is a vacancy in the office of Chief of Staff or during the absence or disability of the Chief of Staff- (1) the Vice Chief of Staff shall perform the duties of the Chief of Staff until a successor is appointed or the absence or disability ceases; or (2) if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled, unless the President directs otherwise, the most senior officer of the Army in the Army Staff who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of the Chief of Staff until a successor to the Chief of Staff or the Vice Chief of Staff is appointed or until the absence or disability of the Chief of Staff or Vice Chief of Staff ceases, whichever occurs first.	(non-traditional) when both are vacant (limited pool, assuming other laws require an Army officer to be CoS)
16.	Commandant of the Marine Corps	10 U.S.C. § 5044(d)(2) (likely meant (d)(1))	§5044. Assistant Commandant of the Marine Corps. (a) There is an Assistant Commandant of the Marine Corps, appointed by the President, by and with the advice and consent of the Senate, from officers on the active-duty list of the Marine Corps not restricted in the performance of duty (b) The Assistant Commandant of the Marine Corps, while so serving, has the grade of general without vacating his permanent grade. [. . . .] (d) When there is a vacancy in the office of Commandant of the Marine Corps, or during the absence or disability of the Commandant- (1) the Assistant Commandant of the Marine Corps shall perform the duties of the Commandant until a successor is appointed or the absence or disability ceases; or (2) if there is a vacancy in the office of the Assistant Commandant of the Marine Corps or the Assistant Commandant is absent or disabled, unless the President directs otherwise, the most senior officer of the Marine Corps in the Headquarters, Marine Corps, who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of the Commandant until a successor to the Commandant or the Assistant Commandant is appointed or until the absence or disability of the Commandant or Assistant Commandant ceases, whichever occurs first.	(1)(B) as to the Assistant Commandant serving as the CoS (1)(B) (non-traditional) when both are vacant (limited pool, assuming other laws require a Marine officer to be the highest-ranking Marine officer)

17.	Commissioner, Social Security Administration	42 U.S.C. § 902(b)(4)	§902. Commissioner; Deputy Commissioner; other officers [. . . .] (4) The Deputy Commissioner shall perform such duties and exercise such powers as the Commissioner shall from time to time assign or delegate. The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.	(1)(A) (non-traditional) Because while it is type-(1)(B) for an absence or disability, for a vacancy, the statute gives the President discretionary authority to displace.
18.	Comptroller General	31 U.S.C. § 703(c)	§703. Comptroller General and Deputy Comptroller General [. . . .] (c) The Deputy Comptroller General- [. . . .] (2) acts for the Comptroller General when the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant.	(1)(B)
19.	Director, Office of Management and Budget	31 U.S.C. § 502(f)	§502. Officers. (a) The head of the Office of Management and Budget is the Director of the Office of Management and Budget. The Director is appointed by the President, by and with the advice and consent of the Senate. Under the direction of the President, the Director shall administer the Office. (b) The Office has a Deputy Director of the Office of Management and Budget, appointed by the President, by and with the advice and consent of the Senate. The Deputy Director- (1) shall carry out the duties and powers prescribed by the Director; and (2) acts as the Director when the Director is absent or unable to serve or when the office of Director is vacant. [. . . .] (f) When the Director and Deputy Director are absent or unable to serve or when the offices of Director and Deputy Director are vacant, the President may designate an officer of the Office to act as Director.	(1)(B) as to the Deputy Director acting as Director of OMB (1)(A) when the office of Deputy Director and Director are both vacant.
20.	Director, U.S. Arms Control & Disarmament Agency	22 U.S.C. § 2563	[*Note: This law was repealed by a separate section of the omnibus law that contained FVRA. Repealed. Pub. L. 105-277, div. G, subdiv. A, title XII, Â§1222, Oct. 21, 1998, 112 Stat. 2681-768.This is how the section used to read:*] § 2563. Deputy Director; appointment; powers and duties. A Deputy Director of the Agency shall be appointed	(1)(B)

			by the President, by and with the advice and consent of the Senate. . . . He shall act for, and exercise the powers of, the Director during his absence or disability or during a vacancy in said office. No person serving on active duty as a commissioned officer of the Armed Forces of the United States may be appointed Deputy Director.	
21.	Director, U.S. Information Agency	5 U.S.C. Appendix 1 (Reorg. Plan No. 2 of 1977, § 3)	[*Note: This law was repealed by a separate section of the omnibus law that contained FVRA. Repealed. Pub. L. 105–277, div. G, title XIII, §1336(6), Oct. 21, 1998, 112 Stat. 2681–790. This is how the section used to read*:] A Deputy Director shall be appointed by the President, by and with the advice and consent of the Senate. The Deputy Director shall act for, and exercise the powers of, the Director during the Director's absence or disability or during a vacancy in said office and, in addition, shall perform such duties and exercise such powers as the Director may from time to time prescribe.	(1)(B)
22.	Director, U.S. International Development Cooperation Agency	5 U.S.C. Appendix 1 (Reorganization Plan No. 2 of 1979, § 3)	Sec. 3. Deputy director The President, by and with the advice and consent of the Senate, may appoint a Deputy Director of the Agency, ... The Deputy Director shall perform such duties and exercise such powers as the Director may from time to time prescribe and, in addition, shall act for and exercise the powers of the Director during the absence or disability of the Director or during a vacancy in such office	(1)(B)
23.	General Counsel, Department of the Treasury	31 U.S.C. § 301(f)(1)	(f)(1) . . . the Secretary may appoint not more than 5 Assistant General Counsels. The Secretary may designate one of the Assistant General Counsels to act as the General Counsel when the General Counsel is absent or unable to serve or when the office of General Counsel is vacant.	(1)(A)
24.	General Counsel, National Labor Relations Board	29 U.S.C. § 153(d)	(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. [. . . .] In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.	(1)(A) (limited time)
25.	President, Export-Import Bank	12 U.S.C. § 635a(b)	. . . . (b) President and First Vice President of the Bank; appointment; duties. There shall be a President of the Export-Import Bank of the United States, who shall be appointed by the President of the United States by and with the	(1)(B)

			advice and consent of the Senate, and who shall serve as chief executive officer of the Bank. There shall be a First Vice President of the Bank, who shall be appointed by the President of the United States by and with the advice and consent of the Senate, who shall serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of President of the Bank, and who shall at other times perform such functions as the President of the Bank may from time to time prescribe.	
26.	Number 26 Skipped or Omitted in the Senate Report's List			—
27.	Number 27 Skipped or Omitted in the Senate Report's List			—
28.	Public Printer, Government Printing Office	44 U.S.C. § 304	In case of the death, resignation, absence, or sickness of the Director of the Government Publishing Office, the Deputy Director of the Government Publishing Office shall perform the duties of the Director of the Government Publishing Office until a successor is appointed or the Director's absence or sickness ceases; but the President may direct any other officer of the Government, whose appointment is vested in the President by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the Director of the Government Publishing Office ceases. A vacancy occasioned by death or resignation may not be filled temporarily under this section for longer than ten days, and a temporary appointment, designation, or assignment of another officer may not be made except to fill a vacancy happening during a recess of the Senate.	(1)(B) (limited pool) Again, while the President has discretion to appoint, it is limited. Using the third appointment option in FVRA would violate this law.
29.	Secretary of Defense	10 U.S.C. § 132(b)	(b) The Deputy Secretary shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office. [*Note: 2014-Subsec. (b). Pub. L. 113–291, title IX, § 901(k), (Dec. 19, 2014) 128 Stat. 3292, 3462, 3468 substituted "dies, resigns, or is otherwise unable to perform the functions and duties of the office" for "is disabled or there is no Secretary of Defense."*]	(1)(B)
30.	Secretary of Education	(20 U.S.C. § 3412(a)(1) (two alternatives))	(a)(1) There shall be in the Department a Deputy Secretary of Education who shall be appointed by the President, by and with the advice and consent of the Senate. During the absence or disability of the Secretary, or in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary. The Secretary shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.	(1)(B)
31.	Secretary of	(42 U.S.C.	There shall be in the Department a Deputy Secretary,	(1)(B)

	Energy	§ 7132(a)) (two alternatives)	who shall be appointed by the President, by and with the advice and consent of the Senate . . . . The Deputy Secretary shall act for and exercise the functions of the Secretary during the absence or disability of the Secretary or in the event the office of Secretary becomes vacant. [2d Alternative] The Secretary shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.	& (1)(B)
32.	Secretary of Health and Human Services	(5 U.S.C. Appendix 1) (two alternatives) (Reorganization Plan No. 1 of 1953, § 2) Cross reference 20 U.S.C. 3508, which makes any reference to the Sec'y of Health, Education, and Welfare mean the Sec'y of HHS.	Sec. 2. Under Secretary and Assistant Secretaries There shall be in the Department an Under Secretary of Health, Education, and Welfare and two Assistant Secretaries of Health, Education, and Welfare, each of whom shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Secretary may prescribe, ... The Under Secretary (or, during the absence or disability of the Under Secretary or in the event of a vacancy in the office of Under Secretary, an Assistant Secretary determined according to such order as the Secretary shall prescribe) shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.	(1)(B)
33.	Secretary of Labor	29 U.S.C. § 552	There is established in the Department of Labor the office of Deputy Secretary of Labor, which shall be filled by appointment by the President, by and with the advice and consent of the Senate. . . . The Deputy Secretary shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate.	(1)(B)
34.	Secretary of Transportation	49 U.S.C. § 102(c)(2)	(c) The Department has a Deputy Secretary of Transportation appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary- (1) shall carry out duties and powers prescribed by the Secretary; and (2) acts for the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant.	(1)(B)
35.	Secretary of Transportation	49 U.S.C. § 102(e)	(e) Assistant Secretaries; General Counsel.- (1) Appointment.-The Department has 6 Assistant Secretaries and a General Counsel, including-	(1)(B)

			[. . . .] (2) Duties and powers.-The officers set forth in paragraph (1) shall carry out duties and powers prescribed by the Secretary. An Assistant Secretary or the General Counsel, in the order prescribed by the Secretary, acts for the Secretary when the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are absent or unable to serve, or when the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant.	
36.	Secretary of the Treasury	31 U.S.C. § 301(c)(2)	(c) The Department has a Deputy Secretary of the Treasury appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall carry out- (1) duties and powers prescribed by the Secretary; and (2) the duties and powers of the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant.	(1)(B)
37.	Secretary of Veterans Affairs	38 U.S.C. § 304	There is in the Department a Deputy Secretary of Veterans Affairs, who is appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall perform such functions as the Secretary shall prescribe. Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.	(1)(A)
38.	Special Counsel, Immigration-Related Unfair Employment Practices	(8 U.S.C. § 1324b(c)(1))	(c)(1)The President shall appoint, by and with the advice and consent of the Senate, a Special Counsel for Immigration-Related Unfair Employment Practices (hereinafter in this section referred to as the "Special Counsel") within the Department of Justice to serve for a term of four years. In the case of a vacancy in the office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy.	(1)(A)
39.	United States Attorney	28 U.S.C. § 546(a)–(d)	(a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant. (b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent. (c) A person appointed as United States attorney under this section may serve until the earlier of- (1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or	(1)(A) (with limitations)

			(2) the expiration of 120 days after appointment by the Attorney General under this section. (d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.	
40.	United States Marshal	28 U.S.C. § 562(a)–(b)	(a) In the case of a vacancy in the office of a United States marshal, the Attorney General may designate a person to perform the functions of and act as marshal, except that the Attorney General may not designate to act as marshal any person who was appointed by the President to that office but with respect to such appointment the Senate has refused to give its advice and consent. (b) A person designated by the Attorney General under subsection (a) may serve until the earliest of the following events: (1) The entry into office of a United States marshal appointed by the President, pursuant to section 561(c). (2) The expiration of the thirtieth day following the end of the next session of the Senate. (3) If such designee of the Attorney General is appointed by the President pursuant to section 561(c), but the Senate refuses to give its advice and consent to the appointment, the expiration of the thirtieth day following such refusal.	(1)(A) (with limitations)

Note: According to 5 U.S.C. § 101 there are 15 current executive departments. Among those not listed among these 40-some were:

(1) The Department of State (created in 1789);

No organic act automatic succession authority exists for the secretary. If it had, it would have been repealed by the Vacancies Act of 1868, which repealed all prior acts dealing with vacancies.

(2) The Department of the Interior (created in 1849);

No authority for automatic succession existed in DOI's organic act. Act of Mar. 3, 1849, 9 Stat. 395 (1849). Had one existed, it too would have been repealed by the Vacancies Act of 1868.

(3) The Department of Agriculture (created 1862; elevated to cabinet-level in 1889);

Originally established by Act of May 15, 1862, 12 Stat. 387 (1862), section 4 called for a chief clerk "who in all cases during the necessary absence of the Commissioner [now Secretary of Agriculture], or when the said principal office shall become vacant, shall perform the duties of Commissioner . . . ."

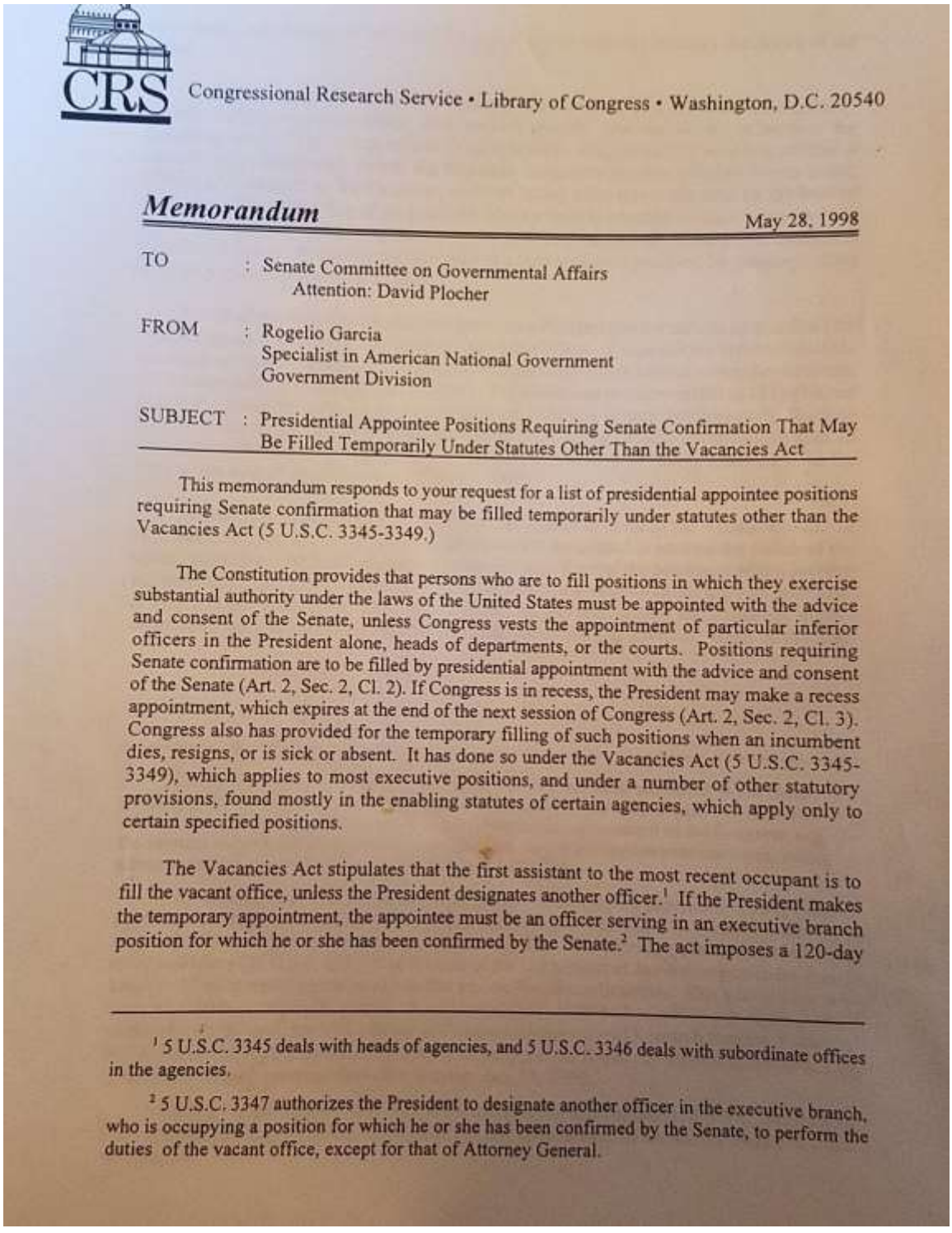
(4) The Department of Commerce (created in 1903);

(5) The Department of Housing and Urban Development (created in 1965)

(6) The Department of Homeland Security (created in 2002),

which in 6 U.S.C. § 113 had a provision not requiring the Deputy to act, but rather identifying the Deputy as a first assistant under FVRA. Later, in 2016, a subsection (g) "Vacancies" would be added that on first reading may allow FVRA to displace a confirmed Deputy acting as DHS Secretary, but not if both offices of the Secretary and Deputy Secretary are vacant. *See* Pub. L. 114–328, div. A, title XIX, §§1901(a), 1903(a), 130 Stat. 2665 , 2672 (2016). Regardless, neither the DHS Organic Act nor its amendments contain separate authority for a deputy to act as secretary, beyond that in FVRA.

REPRODUCTION OF THE CRS MEMO OF 40-SOME STATUTES USED BY THE SENATE REPORT



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Memorandum May 28, 1998

TO : Senate Committee on Governmental Affairs
Attention: David Plocher

FROM : Rogelio Garcia
Specialist in American National Government
Government Division

SUBJECT : Presidential Appointee Positions Requiring Senate Confirmation That May Be Filled Temporarily Under Statutes Other Than the Vacancies Act

This memorandum responds to your request for a list of presidential appointee positions requiring Senate confirmation that may be filled temporarily under statutes other than the Vacancies Act (5 U.S.C. 3345-3349.)

The Constitution provides that persons who are to fill positions in which they exercise substantial authority under the laws of the United States must be appointed with the advice and consent of the Senate, unless Congress vests the appointment of particular inferior officers in the President alone, heads of departments, or the courts. Positions requiring Senate confirmation are to be filled by presidential appointment with the advice and consent of the Senate (Art. 2, Sec. 2, Cl. 2). If Congress is in recess, the President may make a recess appointment, which expires at the end of the next session of Congress (Art. 2, Sec. 2, Cl. 3). Congress also has provided for the temporary filling of such positions when an incumbent dies, resigns, or is sick or absent. It has done so under the Vacancies Act (5 U.S.C. 3345-3349), which applies to most executive positions, and under a number of other statutory provisions, found mostly in the enabling statutes of certain agencies, which apply only to certain specified positions.

The Vacancies Act stipulates that the first assistant to the most recent occupant is to fill the vacant office, unless the President designates another officer.[1] If the President makes the temporary appointment, the appointee must be an officer serving in an executive branch position for which he or she has been confirmed by the Senate.[2] The act imposes a 120-day

[1] 5 U.S.C. 3345 deals with heads of agencies, and 5 U.S.C. 3346 deals with subordinate offices in the agencies.

[2] 5 U.S.C. 3347 authorizes the President to designate another officer in the executive branch, who is occupying a position for which he or she has been confirmed by the Senate, to perform the duties of the vacant office, except for that of Attorney General.

time limit,[3] which may be temporarily suspended, on whoever assumes the duties of the office.

In addition to the Vacancies Act, there are other statutory provisions[4] which expressly provide for the temporary filling of at least 40 specific positions in one or more of the following ways: (1) an acting official is automatically designated; (2) an acting official is automatically designated, unless the President designates another official; (3) an acting official is designated by the President; or (4) an acting official is designated by the head of the agency. For all but four of the positions, no time limit is imposed on how long a position may be temporarily filled. A summary of the positions under each of the above categories is provided below. Following this summary is a listing of each position, by category, along with its pertinent statutory provision.

For 29 of the 40 positions, statutory provisions stipulate that the official next in line (the first assistant) is to assume the duties of the vacant office. The positions involved include the heads of eight departments, 12 agencies, two administrations located within departments, six military units, and one legislative agency. For all but one position–archivist of the United States–the designated official occupies a position requiring Senate confirmation. No time limit is placed on the time the official may serve in an acting capacity. Significantly, of all the positions, only that of deputy attorney general is referred to as "the first assistant" to the head of the agency for purposes of 5 U.S.C. 3345.

At least nine positions fall under provisions similar to those in the Vacancies Act. In each instance, the person next in line is automatically designated to assume the duties of the office, unless the President designates another official. Four of the positions, which involve military heads, provide for an acting head in the event of a vacancy in the top two positions. If that should happen, the most senior officer in the unit, unless the President directs otherwise, assumes the duties and responsibilities of the top position.[5] One of the nine

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[3] If a first or second nomination to fill the vacancy has been submitted to the Senate, the temporary appointment is extended until the nomination is confirmed, or until 120 days after it is rejected or withdrawn; or if the vacancy occurred during an adjournment of the Congress *sine die*, the position may be filled temporarily until 120 days after the Congress next convenes, subject to a first or second nomination being submitted. 5 U.S.C. 3348.

[4] Not considered in this memorandum are general housekeeping provisions vesting heads of agencies with the powers and functions of their agencies and with authority to delegate certain of their authority to officers and employees of those agencies. The attorney general has claimed that those provisions (28 U.S.C. 509-510 in the case of the Department of Justice) empower the agency heads to fill temporarily vacant positions that require Senate confirmation. This position has been challenged by the comptroller general. For a legal analysis of the matter, which rejects the position of the attorney general, see U.S. Library of Congress, Congressional Research Service, *Validity of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, by Morton Rosenberg, CRS general distribution memorandum (Washington: Jan. 14, 1998).

[5] Air force chief of staff (10 U.S.C. 8034(d)(2)), army chief of staff (10 U.S.C. 3034(d)(2)), chief of naval operations (10 U.S.C. 5035(d)(2)), and commandant of the marine corps (10 U.S.C. 4044(d)(2)).

positions, the public printer heading the Government Printing Office, is in the legislative branch. The position may be filled temporarily for only 10 days.[6]

The President is given sole authority to make temporary appointments to four positions. For two of the positions, chairman of the Joint Chiefs of Staff, and director of the Office of Management and Budget, the President may make an appointment when the two top positions are vacant. Otherwise, as mentioned above, the acting official is designated by statute.[7] For another position, general counsel on the National Labor Relations Board, the President may make a temporary appointment to last no longer than 40 days, unless a nomination to fill the vacancy has been submitted, or after the adjournment *sine die* of the session in which the nomination was submitted.[8]

Finally, for 10 positions, department and agency heads may designate the person who will assume the duties of a vacant office. In three instances, the head of the department designates someone to a lower level position as the need arises.[9] The other seven positions include the heads of five departments and two units within departments.[10] For the heads of department positions, the secretary of each department prescribes the order of succession among lower level officers in case the secretary and deputy secretary positions are vacant or their occupants unavailable. The attorney general designates before-hand who assumes the duties of the administrator of the Drug Enforcement Administration if the position becomes vacant,[11] while the surgeon general designates before-hand, from the commissioned ranks of the Public Health Service, who becomes acting surgeon general if the office becomes vacant.[12]

Some of the specific statutory provisions provide for several contingencies, so that, depending on the circumstances, a particular position may be filled temporarily under more than one of the above methods. For example, a vacant position of secretary of education would be filled by the deputy secretary. However, if both the secretary and deputy secretary positions are vacant, who becomes acting secretary depends on an order of succession list of department officials prepared by the secretary.

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[6] 44 U.S.C. 304.

[7] 10 U.S.C. 154(e), and 31 U.S.C. 502(f).

[8] 29 U.S.C. 153(d).

[9] General counsel in the Treasury Department (31 U.S.C. 301(f)(1)), and U.S. attorney (28 U.S.C. 546(d)) and U.S. marshal (28 U.S.C. 562(b)(3) in the Justice Department. Those designated acting for any of these positions need not have been in positions requiring Senate confirmation. Time limits are imposed for acting U.S. attorney and U.S. marshal.

[10] Departments of Education (20 U.S.C. 3412(a)(1)), Energy (42 U.S.C. 7132(a)), Health and Human Services (5 U.S.C. Appendix 1, Reorganization Plan No. 1 of 1953, Sec. 2; 67 Stat. 631), Justice (28 U.S.C. 546(a), and Transportation (49 U.S.C. 102(e)); Drug Enforcement Administration (5 U.S.C. Appendix 1, Reorganization Plan No. 2 of 1973, Sec. 5(c); 87 Stat. 1091), and Surgeon General of the Public Health Service (42 U.S.C. 206(a)).

[11] 2 U.S.C. Appendix 1, Reorganization Plan No. 2 of 1973, Sec. 5(c), 87 Stat. 1091.

[12] 42 U.S.C. 206(a).

The Department of Justice apparently holds that the specific provisions dealing with the temporary filling of vacant positions override the requirements of the Vacancies Act. That interpretation, however, depending on the language of a specific statutory provision, may be open to question. For example, how applicable is the time limitation provision of the Vacancies Act in those instances when a specific statutory provision authorizes the President to designate an officer, other than the first assistant, to fill a vacant position? Justice's stand on this issue appears to have changed drastically over the last 20 years. In 1977, the department stated that a temporary appointment should last only a reasonable period.[13] More recently, however, a department official indicated that a temporary appointment could last almost indefinitely.[14] A question may also arise regarding the interaction between the Vacancies Act and a specific statutory provision, when that provision provides for a deputy principal officer to fill the principal officer position when the incumbent is absent or disabled, but is silent regarding the filling of the position if it is vacant.[15]

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[13] In 1977, the department indicated that a temporary appointment may not continue indefinitely, but that the President should submit a nomination to the Senate within a reasonable time after the position becomes vacant. *Status of the Acting Director, Office of Management and Budget*. Memorandum Opinion for the Counsel to the President, 77-73, dated Dec. 22, 1977, 1 Op. O.L.C. 1977, p. 287.

[14] Testimony of Daniel Koffsky, attorney-adviser in the Office of Legal Counsel, before the Senate Governmental Affairs Committee during oversight hearings on the Vacancies Act on May 18, 1998.

[15] The deputy under secretary of defense for acquisition and technology (10 U.S.C. 133a(b)), and the deputy under secretary of defense for policy (10 U.S.C. 134a(b)) automatically assume the positions of under secretary, if the incumbents in those positions are absent or disabled. Neither of these positions is included in this memorandum because the specific statutory provisions fail to address what happens if the positions are vacant.

STATUTORY PROVISIONS OTHER THAN VACANCIES ACT DESIGNATING ACTING OFFICIALS

Automatic designation of acting official

Administrator, Environmental Protection Agency
The Deputy Administrator ... shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator. (5 U.S.C. Appendix 1, Reorganization Plan No. 3 of 1970, Sec. 1(c); 84 Stat. 2086)

Administrator, Drug Enforcement Administration
The Deputy Administrator ... shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator. (5 U.S.C. Reorganization Plan No. 2 of 1973, Sec 5(c), 87 Stat. 1091)

Administrator, Federal Aviation Administration
The Deputy Administrator acts for the Administrator when the Administrator is absent or unable to serve, or when the office of the Administrator is vacant. (49 U.S.C. 106(i))

Administrator, National Oceanic and Atmospheric Administration
The Deputy Administrator ... shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator. (5 U.S.C. Appendix 1, Reorganization Plan No. 4 of 1970, Sec. 2(c); 84 Stat. 2090)

Administrator, Small Business Administration
The Deputy Administrator shall be Acting Administrator of the Administration during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator. (15 U.S.C. 633(b)(1))

Archivist, National Archives and Records Administration
During any absence or disability of the Archivist, the Deputy Archivist shall act as Archivist. In the event of a vacancy in the office of the Archivist, the Deputy Archivist shall act as Archivist until an Archivist is appointed under subsection (a). (44 U.S.C. 2103(c))

Attorney General, Department of Justice
In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General. (28 U.S.C. 508(a))

When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. (28 U.S.C. 508(b))

Chairman, Joint Chiefs of Staff
When there is a vacancy in the office of Chairman or in the absence or disability of the Chairman, the Vice Chairman acts as Chairman and performs the duties of the Chairman until a successor is appointed or the absence or disability ceases. (10 U.S.C. 154(d))

Director, U.S. Arms Control and Disarmament Agency

[The Deputy Director] shall act for, and exercise the powers of, the Director during his absence or disability or during a vacancy in said office. (22 U.S.C. 2563)

Director, U.S. Information Agency

The Deputy Director shall act for, and exercise the powers of, the Director during the Director's Absence or Disability or during a vacancy in said office .... (5 U.S.C. Appendix 1, Reorganization Plan No. 2 of 1977, Sec. 3; 91 Stat. 1636. Reorganization plan established the International Communications Agency, which later was renamed the U.S. Information Agency.)

Director, U.S. International Development Cooperation Agency

The Deputy Director ... shall act for and exercise the powers of the Director during the absence or disability or the Director or during a vacancy in such office. (5 U.S.C. Appendix 1, Reorganization Plan No. 2 of 1979, sec. 3; 93 Stat. 1378)

President, Export-Import Bank

There shall be a First Vice President of the Bank ... who shall serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of President of the Bank.... (12 U.S.C. 635a(b))

Secretary of Defense

The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary is disabled or there is no Secretary of Defense. (10 U.S.C. 132(b))

Secretary of Education

During the absence or disability of the Secretary, or in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary. (20 U.S.C. 3412(a)(1))

Secretary of Energy

The Deputy Secretary shall act for and exercise the functions of the Secretary during the absence or disability of the Secretary or in the event the office of Secretary becomes vacant. (42 U.S.C. 7132(a))

Secretary of Health and Human Services

The Under Secretary ... shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary. (5 U.S.C. Appendix 1, Reorganization Plan No. 1 of 1953, Sec. 2; 67 Stat. 631. Note: succession provision, written when the Department of Health, Education, and Welfare was established, applies to its successor, HHS.)

Secretary of Labor

The Deputy Secretary shall, (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate. (29 U.S.C. 552)

Secretary, Department of Transportation

The Deputy Secretary acts for the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant. (49 U.S.C. 102(e)(2))

Secretary, Department of the Treasury

The Deputy Secretary shall carry out the duties and powers of the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant. (31 U.S.C. 301(e)(2))

Comptroller General, General Accounting Office (Legislative Office)

The Deputy Comptroller General acts for the Comptroller General when the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant. (31 U.S.C. 703(e))

Automatic designation, unless President designates another official

Administrator, General Services Administration

The Deputy Administrator [not a Senate confirmed position] shall perform such functions as the Administrator shall designate and shall be Acting Administrator of General Services during the absence or disability of the Administrator, and unless the President shall designate another officer of the Government, in the event of a vacancy in the office of Administrator. (40 U.S.C. 751(c))

Chief Judge, Court of Veterans Appeals, Department of Veterans Affairs

In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve as acting chief judge unless the President designates one of the other associate judges to serve as acting chief judge. (38 U.S.C. 7254(d))

Chief of Naval Operations

When there is a vacancy in the Office of Chief of Naval Operations or during the absence or disability of the Chief of Naval Operations ... if there is a vacancy in the office of the Vice Chief of Naval Operations or the Vice Chief of Naval Operations is absent or disabled, unless the President directs otherwise, the most senior officer of the Navy in the Office of the Chief of Naval Operations ... shall perform the duties of the Chief of Naval Operations until a successor to the Chief of Naval Operations or the Vice Chief of Naval Operations is appointed or until the absence or disability of the Chief of Naval Operations or Vice Chief of Naval Operations ceases, whichever occurs first. (10 U.S.C. 5035(d)(2))

Chief of Staff of the Air Force

When there is a vacancy in the Office of Chief of Staff or during the absence or disability of the Chief of Staff ... if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled, unless the President directs otherwise, the most senior officer of the Air Force in the Air Staff ... shall perform the duties of the Chief of Staff until a successor to the Chief of Staff or the Vice Chief of Staff is appointed or until the absence or disability of the Chief of Staff or Vice Chief of Staff ceases, whichever occurs first. (10 U.S.C. 8034(d)(2))

Chief of Staff of the Army

When there is a vacancy in the Office of Chief of Staff or during the absence or disability of the Chief of Staff ... if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled, unless the President directs otherwise, the most senior officer of the Army in the Army Staff ... shall perform the duties of the Chief of Staff until a successor to the Chief of Staff or the Vice Chief of Staff is appointed or until the absence or disability of the Chief of Staff or Vice Chief of Staff ceases, whichever occurs first. (10 U.S.C. 3034(d)(2))

Commandant of the Marine Corps

When there is a vacancy in the Office of Commandant of the Marine Corps, or during the absence or disability of the Commandant ... if there is a vacancy in the office of the Assistant Commandant of the Marine Corps or the Assistant Commandant is absent or disabled, unless the President directs otherwise, the most senior officer of the Marine Corps in the Headquarters, Marine Corps ... shall perform the duties of the Commandant until a successor to the Commandant or the Assistant Commandant is appointed or until the absence or disability of the Commandant or Assistant Commandant ceases, whichever occurs first. (10 U.S.C. 5044(d)(2))

Commissioner, Social Security Administration

The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner. (42 U.S.C. 902(b)(4))

Public Printer, Government Printing Office (Legislative Branch)

In case of the death, resignation, absence, or sickness of the Public Printer, the Deputy Public Printer shall perform the duties of the Public Printer until a successor is appointed or his absence or sickness ceases; but the President may direct any other officer of the Government, whose appointment is vested in the President by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the Public Printer ceases. A vacancy occasioned by death or resignation may not be filled temporarily under this section for longer than ten days, and a temporary appointment, designation, or assignment of another officer may not be made except to fill a vacancy happening during a recess of the Senate. (44 U.S.C. 304)

Secretary of Veterans Affairs

Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary. (38 U.S.C. 304)

President designates acting official

Chairman, Joint Chiefs of Staff

When there is a vacancy in the offices of both Chairman and Vice Chairman or in the absence or disability of both the Chairman and the Vice Chairman, or when there is a vacancy in one such office and in the absence or disability of the officer holding the other, the President shall designate a member of the Joint Chiefs of Staff to act as and perform the

duties of the Chairman until a successor to the Chairman or Vice Chairman is appointed or the absence or disability of the Chairman or Vice Chairman ceases. (10 U.S.C. 154(e))

Director, Office of Management and Budget

When the Director and Deputy Director are absent or unable to serve or when the offices of Director and Deputy Director are vacant, the President may designate an officer of the Office to act as Director. (31 U.S.C. 502(f))

General Counsel, National Labor Relations Board

In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment *sine die* of the session of the Senate in which such nomination was submitted. (29 U.S.C. 153(d))

Special Counsel, Immigration-Related Unfair Employment Practices, Department of Justice

In case of a vacancy in the Office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy. (8 U.S.C. 1324b(c)(1))

Department or agency head designates acting official

Administrator, Drug Enforce Administration

The Deputy Administrator or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator. (5 U.S.C. Appendix 1, Reorganization Plan No. 2 of 1973, Sec. 5(c); 87 Stat. 1091)

Attorney General, Department of Justice

[When the offices of attorney general and deputy attorney general are vacant,] the Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General. (28 U.S.C. 508(b))

General Counsel, Department of the Treasury

[T]he Secretary may appoint not more than five Assistant General Counsels. The Secretary may designate one of the Assistant General Counsels to act as the General Counsel when the General Counsel is absent or unable to serve or when the Office of General Counsel is vacant. (31 U.S.C. 301(f)(1))

Secretary of Education

The Secretary shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices. (20 U.S.C. 3412(a)(1))

Secretary of Energy

The Secretary shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices. (42 U.S.C. 7132(a))

Secretary of Health and Human Services

[In the event of a vacancy in the office of under secretary,] an Assistant Secretary determined according to such order as the Secretary shall prescribe shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary. (5 U.S.C. Appendix 1, Reorganization Plan No. 1 of 1953, Sec. 2; 67 Stat. 631. Note: succession provision, written when the Department of Health, Education, and Welfare was established, applies to its successor, HHS.)

Secretary of Transportation

An assistant secretary or the General Counsel, in the order prescribed by the Secretary, acts for the Secretary when the Secretary and the Deputy Secretary are absent or unable to serve, or when the offices of the Secretary and Deputy Secretary are vacant. (49 U.S.C. 102(e))

Surgeon General, Public Health Service, Department of Health and Human Services

The Surgeon General shall assign one commissioned officer from the Regular Corps to administer the Office of the Surgeon General, to act as Surgeon General during the absence or disability of the Surgeon General or in the event of a vacancy in that office .... (42 U.S.C. 206(a))

U.S. Attorney, Department of Justice

[T]he Attorney General may appoint a United States Attorney for the district in which the office of United States attorney is vacant, [but that person cannot be someone whom the Senate refused to confirm for that office]. [28 U.S.C. 546(a) and (b)] [The person may continue to serve until someone is confirmed for the office, but not beyond the expiration of 120 days after appointment by the Attorney General.] [28 U.S.C. 546(c)(1) and (2)] If an appointment expires under (c)(2), the district court for such district may appoint a United States Attorney to serve until the vacancy is filled. (28 U.S.C. 546(d))

U.S. Marshal, Department of Justice

In the case of a vacancy in the office of United States Marshal, the Attorney General may designate a person to perform the functions of and act as marshal, [but that person cannot be someone whom the Senate refused to confirm for the position]. [28 U.S.C. 562(a)] [The designated person may serve until someone is appointed by the President, but not beyond 30 days following] the end of the next session of the Senate. [28 U.S.C. 562(b)(1) and (2)] [If such designee is refused confirmation by the Senate, he or she must leave office by the end of the 30th day following such refusal.] (28 U.S.C. 562(b)(3))

APPENDIX B

Whitaker Decision Tree

Argument 1: ***The Appointments Clause required Mr. Whitaker to be confirmed because he is not in a position defined to have a supervisor, filling in for the principal officer temporarily.***

What is the correct legal standard:

Does *Edmond v. United States*, 520 U.S. 651 (1997), hold that an officer without a supervisor is a "principal officer"?

Does *United States v. Eaton*, 169 U.S. 331 (1998), hold that an officer is a subordinate rather than a "principal officer" only if his job is defined as an inferior employee who merely steps in for the principal?

Or is it sufficient under *Edmond* and *Eaton* that an official's appointment be "limited in time," without regard to their defined job responsibilities?

Does the Government's position read the Appointments Clause so narrowly as to be inconsistent with the provision's role in the separation of powers?

Is the Government's position supported by:

The history of non-confirmed acting department heads whose job definitions were not inferior positions that temporarily fill in for the principal?

The fact that acting department heads, during that period of service, necessarily lack a supervisor?

Plaintiff's suggestion that the President may name a non-confirmed Acting Attorney General if the officers designated by the AG Act are unavailable?

Is Mr. Whitaker a principal officer under the correct legal standard:

How was Mr. Whitaker's position defined going in to his service as Acting Attorney General?

Is Mr. Whitaker independently a subordinate by reason of having served as Chief of Staff?

Argument 2: ***The Appointments Clause required confirmation because Mr. Whitaker is exercising the authority of a "principal officer," but the appointment—even if "limited in time"—did not respond to "temporary and special conditions" in order to maintain the office's uninterrupted operations.***

Does *Eaton* hold that a subordinate who exercises the authority of a principal officer must be confirmed, if the appointment is "limited in time" but nonetheless does not respond to "temporary and special conditions" to ensure the department's uninterrupted operations? Or is it sufficient under *Eaton* that the appointment be "limited in time"?

What follows from legislative practice embodied in prior vacancies acts:

The 1792 Act, which did not apply to firings or resignations but which allowed the appointment of any person

The 1795 Act, which applied broadly to vacancies with a six-month time limit and continued to allow the appointment of any person

Subsequent vacancies acts

What follows from executive branch practice:

The period from 1789 to 1812

The period from 1812 to 1860

Appointments during a recess of the Senate that were not denominated recess appointments at the time

The Office of the Attorney General specifically, prior to the adoption of the AG Act in 1868, including in light of the fact that the Attorney General was not subject to the Vacancies Act prior to 1868

What are the implications of other prior practices:

The absence of any prior appointments that overrode a congressionally determined successor, or the fact that a congressional delegation statute was never overridden with respect to a principal officer before 2007?

Presidential succession orders under the Vacancies Act denominating acting principal officers?

Has the Government identified a "reasonable time" limitation for the Appointments Clause, and if so what would that be?

Argument 3: ***If an office-specific statute "designates" a successor, the President may only appoint an acting official under the Vacancies Act when the successors designated by the office-specific statute are unavailable.***

Does the Government's reading trigger the canon of constitutional avoidance?

When an office-specific statute "designates" an acting official for purposes of Section 3347(a), may the President choose between the Vacancies Act and the office-specific statute?

Does Section 3348(d) establish that the Vacancies Act is not "non-exclusive" when it applies, because acts under the other statute are void?

Does the word "designate" mean that the official is in fact specified by the office-specific statute, and thus not the Vacancies Act?

What is the implication of the exception for the GAO?

Is the Plaintiff's position supported by the absence of a provision allowing the President to choose between the statutes?

Is the Plaintiff's argument supported by the Executive Order designating acting officials under the Vacancies Act when the officials designated by the AG Act are unavailable (Exec. Order 13,787) and that Executive Order's predecessors?

Is the Plaintiff's position supported by:

Other statutory provisions that permit the President to override a default statutory designation of an acting official, while the Vacancies Act does not with respect to office-specific designation statutes?

Congress's supposed adoption the statute to reject the Office of Legal Counsel's view that because the Vacancies Act was "non-exclusive" the President could use that statute or office-specific statutes such as the AG Act?

The statutory history of the Vacancies Act:

Floor statements by the bill's Senate sponsors?

The lack of acknowledgment by members of Congress or the Executive Branch that —

the Vacancies Act would grant the President such a power

that Congress would be overturning the understanding that the Vacancies Act does not override office-specific designation statutes

that Congress would be negating the purpose of office-specific designation statutes

Is the Government's position supported by:

The list of excluded offices in Section 3347c or Congress's failure to use the "shall not apply" formulation of that provision?

The provision of the prior statute expressly excluding the Office of the Attorney General (5 U.S.C. 3345 (1966)), which is omitted from the Vacancies Act, and which the Government asserts was the reason the Attorney General at that time was not subject to the Vacancies Act?

The history of the draft Senate bill of the Vacancies Act (S. 2176):

The fact that the bill excluded the Office of the Attorney General, but the statute enacted by Congress did not?

The discussion in the Report on the Senate bill (S. Rep. 105-207) of whether the bill would be non-exclusive?

The AG Act (28 U.S.C. 508):

Given that the AG Act "designates" the Acting Attorney General for purposes of Section 3347(a), are the particular provisions of the AG Act relevant?

Under the statutory language of the AG Act, would the Deputy Attorney General have been appointed automatically under the prior vacancies act, and what does that imply about the statute's meaning?

Does to the provisions that the Deputy Attorney General "may" serve as Acting Attorney General, whereas the Associate "shall" serve if the Deputy is unavailable, support the conclusion that the President may appoint a person other than the Deputy under the Vacancies Act?

Does the provision stating that the Deputy Attorney General is the "first assistant" for purposes of the Vacancies Act support the conclusion that the AG Act does not displace the Vacancies Act?

The conclusions of other courts that the Vacancies Act is "non-exclusive"?